THE NORTHERN IRELAND LAW REPORTS

1956.

BELFAST:
PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR
NORTHERN IRELAND,
BY
JOHN AIKEN & SON, LIMITED,
KING STREET.

THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW

1956

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PUBLISHED BY THE INCORPORATED COUNCIL OF LAW REPORTING
FOR NORTHERN IRELAND

1956

Judges and Law Officers

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1956

April 10. The Rt. Hon. JOHN EDMOND WARNOCK, ESQUIRE, Q.C., M.P., Attorney-General for Northern Ireland, resigned this day.

April 14. The Rt. Hon. WILLIAM BRIAN MAGINESS, ESQUIRE, Q.C., M.P., was appointed to be Attorney-General for Northern Ireland, in the place of the Rt. Hon. JOHN EDMOND WARNOCK, ESQUIRE, Q.C., M.P., resigned.

July 10. The Rt. Hon. SAMUEL CLARKE PORTER, a Lord Justice of Her Majesty's Court of Appeal in Northern Ireland, died this day.

October 1. The Hon. LANCELOT ERNEST CURRAN, a Justice of Her Majesty's High Court of Justice in Northern Ireland, was appointed to be a Lord Justice of Her Majesty's Court of Appeal in Northern Ireland in the place of the late Lord Justice PORTER.

October 1. HERBERT ANDREW MCVEIGH, ESQUIRE, Q.C., was appointed to be a Justice of Her Majesty's High Court of Justice in Northern Ireland, in the place of the Hon. Mr. Justice CURRAN, raised to be Lord Justice of Appeal.

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ERRATUM

Page 36—The title of the case should read "SAMUEL MCCAUSLAND LTD. *v.* MINISTRY OF COMMERCE".

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

PARKINSON and ANOTHER v. WATSON[1]

Practice—Probate—Proof of will in solemn form—Plea of undue influence—Particulars—R.S.C. Or. 19, *rr.* 6, 7.

Court of Appeal—Bound by its own decisions.

House of Lords—Appeal from Court of Appeal—Orders in probate matters—Probate and Letters of Administration (Ireland) Act, 1857 (20 & 21 *Vict., c.* 79), *s.* 45—*Judicature Act (Ireland)*, 1877 (40 & 41 *Vict., c.* 57), *s.* 86.

In an action for probate of a will in solemn form particulars of a plea of undue influence will not be ordered.

Kerr v. Browne (1944—unreported) followed.

The Court of Appeal in Northern Ireland, like the Court of Appeal in England, is bound by its previous decisions save in the limited and exceptional classes of case enumerated in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718.

An application to the court for particulars of a plea of undue influence in a probate action was refused, and this decision was affirmed by the Court of Appeal on the ground that the same had been held by that court in *Kerr v. Browne* (1944—unreported), and as that case had not been decided per incuriam it must be followed. A request for a further hearing before a "full Court of Appeal" was refused on the ground that the practice of the former Court of Appeal in Ireland sitting as a "full Court of Appeal" to review its own decisions appears to have been limited to those cases where no further appeal to the House of Lords was possible, and section 86 of the Judicature Act (Ireland), 1877, preserves a right of appeal to the House of Lords from all orders, final and interlocutory, in probate matters. *Quaere* if in any circumstances a "full Court of Appeal" in Northern Ireland has power to review previous decisions of the Court of Appeal.

[1] In the Court of Appeal before Porter and Black L.JJ. and Sheil J.: May 16, 17, July 1, 1955.

APPEAL from an order of Lord MacDermott L.C.J. refusing an application for particulars of undue influence pleaded by the defendant in an action for probate of a will in solemn form.

McSparran Q.C., *Harrison Q.C.* and *Brown* for the plaintiffs and appellants.

McVeigh Q.C. and *MacDermott* for the defendant and respondent.

Cur. adv. vult.

PORTER L.J.: This is an appeal from an order of the Lord Chief Justice refusing an application for particulars of undue influence pleaded in the defence of the respondent. The appellants, as executors of the will of Susanna Watson dated March 31, 1951, claimed probate of the will in solemn form of law. The respondent, who was one of the next of kin and had lodged a caveat, pleaded (inter alia) that the execution of the will was obtained by the undue influence of the said Agnes P. Sutherland, and by his counterclaim claimed that the deceased had made her true last will dated October 12, 1931, whereof the two executrices were both since dead. He claimed that the court would pronounce against the will propounded by the appellants and grant letters of administration, with the will of October 12, 1931, annexed, to the respondent.

The Lord Chief Justice being of opinion that the decision of the Court of Appeal in *Kerr v. Browne*[1] concluded the matter against the appellants ordered that the motion be dismissed.

Opening the case for the appellants, counsel stated that the appeal was brought to determine whether this court was bound by the decision in *Kerr v. Browne*[1]. That case was heard by a court consisting of Babington and Murphy L.JJ. and Black J. (as he then was). It is not reported, but the order made and the registrar's notes have been produced, and we have had the advantage of perusing the notes made at the hearing by each of the three learned judges. These notes shew that the arguments adduced by the applicant for particulars were the same as in the present case. Order 19 rule 6 was cited to shew that as regards necessity for the delivery of particulars there was no difference between undue influence and misrepresentation, fraud, breach of trust or wilful default, and if particulars ought to be given in a Chancery suit in which a deed was being impugned on the ground of undue influence, it was unreasonable that they should be withheld in a probate suit. It

[1] Unreported: 1944.

was true that in *Wallace v. M'Dowell*[1] the former Irish Court of Appeal (Sir James Campbell C. and Ronan L.J.) had refused to order particulars, but that decision was based on the settled practice in Ireland which was said to be identical with the English. In the English case *Lord Salisbury v. Nugent*[2], a court consisting of three eminent judges (Cotton, Lindley and Fry L.JJ.) held they were bound by the settled practice of the Court of Probate; but, argued counsel, that practice was based on rule 40 of the Contentious Practice in Probate Rules, 1865, which allowed the defendant in probate actions to plead several defences, and in only one case (viz. a plea of want of knowledge and approval of the contents of a will) did it require delivery of particulars stating shortly the substance of the case the defendant intended to set up. Rule 40, however, did not apply to Ireland, and if a practice similar to the English practice had grown up in Ireland there was no reason why the Court of Appeal should sanction it. The court, however, refused to depart from the settled practice.

I do not think there is any foundation for the suggestion that the court in *Kerr v. Browne*[3] considered that it was bound to follow the decision in *Wallace v. M'Dowell*[1]. It had been decided in *R. (Greenaway) v. Armagh JJ.*[4], that the Court of Appeal in Northern Ireland was not bound to follow a decision of the former Court of Appeal in Ireland, and that case was well known to the court because two of the learned judges, when they were members of the Bar, had appeared as counsel in the case. There can be no doubt that the decisions in *Wallace v. M'Dowell*[1] and *Kerr v. Browne*[3] were based on established practice in probate actions. In *Lord Salisbury v. Nugent*[2] Lindley L.J. said that the practice was old and well established and appeared to be founded on good sense, and that the case might depend on a multitude of circumstances of which it would be impossible to give particulars. Cotton L.J. appeared to have some doubts about the reasonableness of the practice and said if they were dealing with a new practice he would say it was reasonable to require from the defendant a general statement of the facts on which he intended to rely.

In England the practice was altered in 1901 by the addition of rule 25A to Order 19, which is as follows:

"In Probate actions it shall be stated with regard to every defence "which is pleaded what is the substance of the case on which it is

[1] [1920] 2 I.R. 194.
[2] (1883) 9 P.D. 23.
[3] Unreported: 1944.
[4] [1924] 2 I.R. 55.

"intended to rely: and further where it is pleaded that the testator "was not of sound mind, memory, and understanding, particulars "of any specific instances of delusion shall be delivered before the "case is set down for trial and except by leave of the Court or "a Judge, no evidence shall be given of any other instances at "the trial."

Ronan L.J. in *Wallace v. M'Dowell*[1], while agreeing with Sir James Campbell C. that the Irish practice had been identical with the English, said that rule 25A had left the decision in *Lord Salisbury v. Nugent*[2] unaffected, but Sir Henry Duke P. in *McLeod v. Earl of Shrewsbury*[3] held that the rule was intended to alter and did alter the practice. He said he had inquired of the registrars and that their practice was to make orders for further and better *substance* of the plea of undue influence, but not particulars of undue influence except as to the names of the persons charged.

There can be no doubt that this rule has the effect of overruling the decision in *Lord Salisbury v. Nugent*[2] (see Annual Practice, 1955, p. 365) and of altering the practice in probate actions in England, but even under this rule an order will not be made for further and better *particulars* of the undue influence but only for further and better *substance* of the plea. We are therefore asked to make an order which an English Court under this amending rule could not make—an order for further and better particulars of undue influence. Moreover, the appellants in this case are on less favourable ground than the appellant in *Kerr v. Browne*[4]. The only obstacle in that case was the long established practice, whereas in this case there is a far more serious difficulty—viz. the decision of this court which confirmed and followed the settled practice. In order to succeed the appellant must shew that this court is not bound by its own former decision on this question.

This is the first time that the court has been asked to overrule its own former decision. One case was cited to us in which the former Irish Court of Appeal overruled its own decision on a point of law. *In re Scott's Estate*[5] was a decision of a specially constituted court of six judges on a point of law arising under section 21 of the Irish Land Act, 1903, which provided that in case of a sale of an estate where portion of a holding consisted of bog and the purchaser had not an exclusive right of turbary before the sale, the Land Commission might make regulations authorising

[1] [1920] 2 I.R. 194
[2] [1883] 9 P.D. 23.
[3] [1922] P. 112.
[4] Unreported; 1944
[5] [1916] 1 I.R. 180.

the cutting and making of turf on that bog by any occupiers of land in the neighbourhood for whose requirements such turf appeared to be necessary upon such terms as to payment or otherwise as may appear to them to be just. In *King-Harman's Estate*[1] the Court of Appeal had decided that the power to make regulations extended only to pre-existing rights and privileges, the object being to provide for the mode of working these rights or privileges so as to prevent disputes and litigation.

The full court in *In re Scott's Estate*[2] held that there was no such limitation in section 21, and that the Estates Commissioners had power to make regulations authorising the cutting and making of turf on the bog by any occupiers of land in the neighbourhood of the holding for whose requirements such turf appeared to be necessary, and that the power to make the regulations was not confined to the period before the vesting or fiat, but such regulations could be made after the completion of the purchase, even though there was no express reservation of turbary rights in the vesting order or fiat.

Thus the decision in *King-Harman's Estate*[1] was overruled by a full court consisting of six judges. Sir Ignatius O'Brien C. said that the question was not argued in *King-Harman's Estate*[1] and if it had been argued that he felt perfectly sure a different conclusion would have been arrived at. Cherry L.C.J. said that there was no appearance for the Estate Commissioners in that case, and that the decision was unsatisfactory. O'Connor M.R. said that the decision was the result of raising a wrong issue so that the real question was obscured. Molony L.J. was of opinion that the case was wrongly decided. No doubt appears to have been entertained by the members of the court of their power to overrule a former decision of the court which consisted of three members only, Sir Samuel Walker C., FitzGibbon and Holmes L.JJ.

There is a peculiar and a very doubtful decision in *Milligan v. Corporation of Londonderry*[3] in which the court, consisting of Sir James Campbell C., Ronan and O'Connor L.JJ. (the latter dissenting) refused to follow a former decision of the court in *Bell v. King's County County Council*[4].

In *Bell's* case[4] the court held that a wire fence was not within the words of section 135 of the Grand Jury (Ireland) Act, 1836—"any bank, gate, lock, weir, sluice, bridge, dam, or other work

1 [1908] 1 I.R. 202.
2 [1916] 1 I.R. 180.
3 [1920] 2 I.R. 1.
4 [1910] 2 I.R. 25.

"belonging to any person, public canal, or navigation."—because the other work referred to must be construed ejusdem generis, that is to say, work connected with a canal or navigation. The court in *Milligan's* case[1] decided that a farm gate was a gate within the meaning of the section, although it has no connection with a canal or navigation. O'Connor L.J. dissented, saying that the question was settled in *Bell's* case[2].

Bell's case[2] was decided by three judges—Sir Samuel Walker C., Holmes and Cherry L.JJ. I do not think there is any other case in the reports in which the unanimous decision of three judges of the Court of Appeal was overruled by a majority decision of two judges of the court. I venture to think that *Milligan's* case[1] was wrongly decided, but whether it be right or wrong, the two judges who formed the majority of the court appear to have set little store upon that judicial comity which obliges a court to bow to its own decisions. It is not a precedent which this court should or would follow. Notwithstanding the decision in *Milligan's* case[1] it was the practice of the Irish Court of Appeal to abide by its own decision on a question of law except where the decision was manifestly wrong or had been reached per incuriam, in which case a full court was summoned for the purpose of reconsidering and if necessary overruling the previous decision. Such was the practice also in registration cases where the court was exercising a peculiar jurisdiction.

Palles C.B. discussing the constitution of the Court of Appeal in *Ladd v. O'Toole*[3], said with reference to this practice: "We",—that is the judges—"therefore, arranged that we should act on our "previous decisions except when sitting in a Court specially sum- "moned (as is the present Court) to reconsider the question deter- "mined by the impugned decision."

Again in *Coyle v. Mahon*[4], the court, consisting of O'Brien L.C.J., FitzGibbon and Holmes L.JJ., held itself bound by the decision in *M'Bride v. Bryans*[5]. FitzGibbon L.J. said[6]: "I am bound "by *M'Bride's* case[5], though I am still unable to understand how "it can be reconciled with the Act of 1878....we cannot re-open "the question, unless or until the full Court thinks it right to re- "consider it, as *Hasson v. Chambers*[7], was reconsidered after *Strib- "ling v. Halse*[8] which it had followed, had been discredited."

1 [1920] 2 I.R. 1.
2 [1910] 2 I.R. 25.
3 [1904] 2 I.R. 389, 407.
4 [1908] 2 I.R. 622.
5 [1908] 2 I.R. 329.
6 [1908] 2 I.R. at 628.
7 (1885) 18 L.R. Ir. 68.
8 (1885) 16 Q.B.D. 246.

Further in *Leyburn v. Armagh County Council*[1], a case before the High Court of Appeal in Ireland, Molony C.J. said: "Former "decisions of the old Court of Appeal could have been overruled "by assembling the full Court."

The practice of the Court of Appeal in England is clear. In *Velasquez, Ltd. v. Inland Revenue Commissioners*[2] Lord Cozens Hardy in the Court of Appeal said: "But there is one rule by which, "of course, we are bound to abide—that when there has been a "decision of this Court upon a question of principle it is not right "for this Court, whatever its own views may be, to depart from "that decision. There would otherwise be no finality in the law."

The matter was discussed at some length by Lord Greene M.R. in *Young v. Bristol Aeroplane Co. Ltd.*[3], and in delivering the judgment of the court he said that the Court of Appeal was bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. He then specified three exceptions to this rule as follows: "(1) The court is entitled and bound to decide "which of two conflicting decisions of its own it will follow. (2) "The court is bound to refuse to follow a decision of its own which, "though not expressly overruled, cannot, in its opinion, stand with "a decision of the House of Lords. (3) The court is not bound to "follow a decision of its own, if it is satisfied that the decision was "given per incuriam."

Lord Simon in the same case in the House of Lords referring to this question said[4]: "One of the conclusions reached in the "judgment of the Master of the Rolls, with which I agree, is that "if the Court of Appeal, when sitting in one of its divisions, has "in a previous case pronounced on a point of law which necessarily "covers a later case coming before the court, the previous decision "must be followed (unless, of course, it was given per incuriam "or unless the House of Lords has in the meantime decided that "the law is otherwise)."

This decision concludes the case against the appellants.

There is, however, one other matter which I should mention. It has been suggested rather than argued that the above rule is not binding upon the Court of Appeal in cases where there is no appeal to the House of Lords, and that in such cases the court, being a final Court of Appeal, would have jurisdiction to reconsider and overrule a former decision of its own on a question of

1 [1922] 2 I.R. 58, 60.
2 [1914] 3 K.B. 458, 461.
3 [1944] K.B. 718, 729.
4 [1946] A.C. 163 at 169.

law. Formerly under section 45 of the Probate and Letters of Administration (Ireland) Act, 1857, an appeal lay from an interlocutory order of the Court of Probate (by leave of the court) to the Court of Appeal in Chancery, and thence to the House of Lords, but section 45 was repealed by the Statute Law Revision Act, 1893 (Schedule), and by section 5 of the Supreme Court of Judicature (Ireland) (No. 2) Act, 1897, the Probate and Matrimonial Division was fused and amalgamated with the Queen's Bench Division. Therefore it was said there is now no appeal from an interlocutory order of the Court of Appeal to the House of Lords because section 45 which gave the appeal has been itself repealed.

I think, however, that this question is settled by the provisions of section 86 of the Judicature Act (Ireland), 1877, which is as follows: "All decisions, judgments, decrees or orders of the Court "of Appeal shall be subject to appeal to the House of Lords in "the cases and under the conditions in and under which the like "decisions, decrees, judgments, or orders of the Court of Appeal "in Chancery in Ireland....would have been subject to appeal to "the House of Lords." This section seems to me to preserve the right of appeal to the House of Lords from an interlocutory order of this court in a probate suit notwithstanding the repeal of section 45.

However that may be, I am not prepared to overrule *Kerr v. Browne*[1], a case which cannot be said to have been decided per incuriam. If it is thought fit to alter the existing practice so as to bring it more into line with modern ideas of pleading, a rule similar to the English Order 19, rule 25A might be introduced into our Order 19 by the rule-making authority.

BLACK L.J.: This action is brought by the appellants claiming as executors appointed by a will of one Susanna Watson to have the said will established and probate thereof granted in solemn form of law. The respondent by his defence alleges (inter alia) that the execution of the said will was obtained by the undue influence of the appellant, Agnes P. Sutherland. The appellants having applied by motion for an order directing the respondent to furnish further and better particulars of this alleged undue influence the Lord Chief Justice refused the application on the authority of *Kerr v. Browne*[1], an unreported decision of this court. From this refusal the appellants have brought the present appeal.

[1] Unreported; 1944.

The appellants base their contention that the particulars ought to be ordered upon the wording of Order 19, rule 6 of the Rules of the Supreme Court.

The material portion of that rule reads as follows:—

"In all cases in which the party pleading relies on any misrepre-"sentation, fraud, breach of trust, wilful default, *or undue influence* ".... particulars (with dates and items if necessary) shall be stated "in the pleading."

The appellants contend that this rule is applicable to all actions in the High Court and that there is nothing in the Rules of Court to exclude its application to probate actions. When undue influence is alleged in a probate action they submit that under the rule particulars of the allegation must be given just as they would have to be given in a Chancery action in which the execution of a deed was alleged to have been procured by undue influence. It appears to me that if we could approach Order 19, rule 6, unfettered by authority, it would be difficult to see any answer to this contention. There are, however, a number of decisions to which regard must be had: one of these decisions, the unreported case of *Kerr v. Browne*[1], by which the Lord Chief Justice considered himself bound, is also I fear binding on this court.

Before the Judicature Acts the settled practice of the Probate Court was not to require any particulars to be furnished of a plea of undue influence other than the names of the persons alleged to have exercised the undue influence. The effect of the decision of the English Court of Appeal in *Lord Salisbury v. Nugent*[2] was to confirm that this should continue to be the practice of the Probate Division in England notwithstanding the provisions of the English Order 19, rule 6, the wording of which is followed in our rule. The same practice continued in the Irish courts though so far as I am aware the point did not arise for decision in any reported case until *Wallace v. M'Dowell*[3]. In that case the Irish Court of Appeal (Sir James Campbell C. and Ronan L.J.), affirming the decision of Kenny J., held that they would not disturb the settled practice in Ireland that particulars of undue influence should not be ordered. Sir James Campbell C., after quoting Order 19, rule 6, observes[4]: "I think it is the experience of every member of the "profession that this rule, in so far as it directs particulars of undue "influence to be stated in the pleading, has always been ignored

[1] Unreported; 1944.
[2] (1883) 9 P.D. 23.
[3] [1920] 2 I.R. 194.
[4] Ibid. at 197.

"in practice." And he concludes[1]: "I do not think that it would "be right for this Court to interfere with this settled practice, "supported as it is by the decision of the Court of Appeal in Eng- "land in *Salisbury v. Nugent*[2]." Few judges were better qualified from long and wide experience to speak as to the settled practice in Ireland than Sir James Campbell C. and Ronan L.J. and their experience is corroborated by the fact that in the recognised Irish text-books (Maxwell's Probate Practice, p. 138, and Wylie's Judicature Acts 1906 ed., p. 377.) *Lord Salisbury v. Nugent*[2] is quoted as authority for the proposition that particulars of undue influence will not be ordered.

In the meantime, however, a new rule (Order 19, rule 25A) had been made in England directing that "In Probate actions it shall be "stated with regard to every defence which is pleaded what is the "substance of the case on which it is intended to rely." No such rule, however, was introduced into the Irish rules and we have no such rule in Northern Ireland. In *McLeod v. Earl of Shrewsbury*[3], Sir Henry Duke P. had occasion to consider this rule and differed from the views as regards its scope which had been expressed by the members of the Irish Court of Appeal in *Wallace v. M'Dowell*[4]. The effect of his decision is that where there is a plea that a will was obtained by undue influence the person propounding the will is entitled under Order 19, rule 25A, to have stated in the substance of the case particulars of the character of the undue influence and of the acts alleged in the exercise of it with the necessary dates but not of the names of the persons present. The important part, however, of his judgment for the present purpose is that he points out that when *Salisbury v. Nugent*[2] was decided in 1883 there was an existing and established practice in probate which had not been overruled by Order 19, rule 6, and that that practice was to be found embodied in rule 40 (or rather rule 40A—see judgment of Willmer J. in *In re R. deceased*[5]) of the Rules of Contentious Practice in Probate, a rule made in 1865 under statutory powers and not revoked expressly before 1883 or indeed since.

In reliance on what was said by Sir Henry Duke in his judgment in *McLeod v. Earl of Shrewsbury*[3] it was argued on behalf of the appellants in the present case that the Court in *Wallace v. M'Dowell*[4] was under a complete misconception as regards the basis on which *Salisbury v. Nugent*[2] was decided. According to Sir Henry Duke

[1] [1920] 2 I.R. at 198.
[2] (1883) 9 P.D. 23.
[3] [1922] P. 112.
[4] [1920] 2 I.R. 194.
[5] [1951] P. 10, 20.

the justification for the decision in *Salisbury v. Nugent*[1] was that rule 40A of the old Contentious Probate Rules of 1865 was still in force and that the established practice founded upon that rule had not been overruled by Order 19, rule 6, whereas in Ireland all rules of procedure of the Court of Probate before the Judicature Acts had been expressly repealed by Appendix R. of the Rules of the Supreme Court (Ireland), 1891. And it was pointed out that on more than one occasion this court has held that it is at liberty to reconsider and, if it thinks proper, to refuse to follow a decision of the old Irish Court of Appeal: *R. (Greenaway) v. Armagh JJ.*[2]; and *Collier v. Down County Council*[3].

On the other hand this court has stated that it is bound by its own decisions: *Firman v. Malocca*[4] in which the court held itself bound by its previous decision in *R. (Sherry) v. County Court Judge of Fermanagh*[5]. The precise point raised in the present appeal was decided by this court in 1944 in the case of *Kerr v. Browne*[6]. That was a case in which there were very strong grounds to be urged in support of the claim to be furnished with particulars of the allegation of undue influence but this court expressly held that the settled practice was that such particulars would not be ordered.

The question whether there are any circumstances in which a Court of Appeal is entitled to reconsider a previous decision of its own has been much discussed in the Court of Appeal in England in the recent cases of *Young v. Bristol Aeroplane Co. Ltd.*[7]; *Gibson v. South American Stores (Gath & Chaves) Ltd.*[8]; and *Morelle Ltd. v. Wakeling*[9]. And in *Young v. Bristol Aeroplane Co. Ltd.* in the House of Lords,[10] Viscount Simon accepts that previous decisions of the Court of Appeal could not normally be overruled by that court.

In these decisions of the English Court of Appeal the court indicated that only in certain very limited and exceptional classes of case was the court entitled to reconsider previous decisions of its own. It was ultimately conceded on behalf of the appellants in the present case that the only one of these classes within which the present case could be said to fall was the class in which it could be shown that the prior decision of the court had been given per incuriam, e.g., in ignorance of the terms of a statute or of a decision of the House of Lords ruling the point at issue. In *Gibson's* case[8] the

1 (1883) 9 P.D. 23.
2 [1924] 2 I.R. 55.
3 [1941] N.I. 113.
4 [1944] N.I. 91, 105.
5 [1935] N.I. 211.
6 Unreported; 1944.
7 [1944] K.B. 718.
8 [1950] Ch. 177.
9 [1955] 2 Q.B. 379.
10 [1946] A.C. 163, 169.

opinion was expressed that the onus lay upon the party alleging that a previous decision had been given per incuriam to establish that fact. However this may be, we have had an opportunity of perusing not only the Registrar's note book but also the note books of all three judges who constituted the court in *Kerr v. Browne*[1]. From these note books it is abundantly clear that counsel on behalf of the appellants in that case put forward all the arguments which were adduced by counsel for the appellants in the present appeal. They argued that *Wallace v. M'Dowell*[2] had been wrongly decided on a mistaken view of the rules governing the practice in probate actions and indeed in the teeth of the express provisions of Order 19, rule 6, which they contended was applicable to probate actions just as much as to any other actions. They referred to Sir Henry Duke's judgment in *McLeod v. Earl of Shrewsbury*[3]: they pointed out that in Ireland all the old Irish rules of probate practice prior to the Judicature Acts had been expressly repealed by the Rules of the Supreme Court (Ireland) 1891: and they submitted that the practice in probate actions was now governed by the existing Rules of the Supreme Court in which there was nothing to suggest that Order 19, rule 6, did not apply to such actions. Nor did they omit to cite *R. (Greenaway) v. Armagh JJ.*[4] as showing that this court did not consider itself bound by the decisions of the old Irish Court of Appeal. Whether the decision in *Kerr v. Browne*[1] was right or wrong, it is impossible to say that it was arrived at per incuriam by this court. Nor is *Kerr v. Browne*[1] any the less binding because it chances not to have found its way into the reports. In *Gibson v. South American Stores (Gath & Chaves) Ltd.*[5], the English Court of Appeal held itself bound to follow its decision in the earlier unreported case of *In re Sir Robert Laidlaw*[6].

It was suggested by counsel on behalf of the appellants that a "full Court of Appeal" should be assembled to reconsider *Kerr v. Browne*[1] if the present court felt doubt about the correctness of that decision. Quite apart from the practical difficulties of arranging this in a jurisdiction such as ours where we have only five judges, and the judge whose decision is appealed against is debarred by statute from sitting on the hearing of the appeal, we cannot lose sight of the fact that in *Young v. Bristol Aeroplane Co. Ltd.*[7] an English Court of Appeal constituted by six judges held unanimously that a so called "full court" has no greater authority than an

1 Unreported; 1944.
2 [1920] 2 I.R. 194.
3 [1922] P. 112.
4 [1924] 2 I.R. 55.
5 [1950] Ch. 177.
6 Unreported; 1935.
7 [1944] K.B. 718.

ordinary court of three judges to overrule previous decisions of the court. Undoubtedly, however, in Ireland a full court was occasionally assembled for the purpose of reconsidering previous decisions. So far as my research goes the class of case in which this course was most frequently taken appears to have been registration appeals. I would refer to *Comiskey v. Bourne*[1]; *M'Keowne v. Bradford*[2]; *Brown v. Buchanan*[3]; *Ladd v. O'Toole*[4]; *Steele v. Mahon*[5]. The court seems to have considered that in this type of case they had a peculiar and exceptional jurisdiction which entitled them to review their own previous decisions. And indeed the same view in regard to registration appeals appears to have been taken by the courts in England (See *Hadfield's* case[6]). In other appeals the limit of the jurisdiction assumed by the Irish Court of Appeal to reconsider its previous decisions is indicated in the judgment of Sir Ignatius O'Brien C. in *In re Scott's Estate*[7], one of the latest, if not the latest, of the cases in which this jurisdiction was exercised, where he states that in a case where an appeal lay to the House of Lords such appeal would of course be the only mode of settling the question at issue but that in matters where the decisions of the Court of Appeal was final a previous decision could be reviewed and, in substance, reversed by the court itself where the full court had had an opportunity of reconsideration. By section 86 of the Judicature Act (Ireland), 1877, it was enacted that all decisions or orders of the Court of Appeal should be subject to appeal to the House of Lords in the cases in which the like decisions or orders of the Court of Appeal in Chancery would have been subject to appeal to the House of Lords if the Act had not been passed. Section 45 of the Probate and Letters of Administration (Ireland) Act, 1857, conferred a full right of appeal to the Court of Appeal in Chancery and from the Court of Appeal in Chancery to the House of Lords from all orders, whether final or interlocutory orders, of the Court of Probate in Ireland. There would appear to be no doubt that this right of appeal still exists by virtue of the provisions of section 86 of the Act of 1877, notwithstanding the repeal of section 45 of the Act of 1857 by the Statute Law Revision Act, 1883. The existence of an appeal to the House of Lords from a decision of the Court of Appeal in a case such as the present was recognised by Sir James Campbell C. at the conclusion of his judgment in *Wallace v. M'Dowell*[8]. According,

1 [1861] 6 Ir. Jur., N.S. 109
2 [1862] 7 Ir. Jur., N.S. 175.
3 [1894] 2 I.R. 318.
4 [1904] 2 I.R. 389.
5 [1910] 2 I.R. 207.
6 [1873] L.R. 8 C.P. 306.
7 [1916] 1 I.R. 180, 194.
8 [1920] 2 I.R. at 198.

therefore, to the practice of the Irish Court of Appeal as expounded by Sir Ignatius O'Brien C. in *In re Scott's Estate*[1] the present is not a case of the class in which a full court would have been convened for the purpose of reconsidering a previous decision of the court.

In the result I cannot come to any other conclusion than that in accordance with settled practice the decision in *Kerr v. Browne*[2] cannot now be reviewed or overruled by this court. But now that attention has been called to the difference between our practice and the practice in England it may be that the Rules Committee may consider whether or not it might be desirable to introduce into our rules a provision on the lines of the English rule 25A. As well as in the judgment of Sir Henry Duke P. in *McLeod v. Earl of Shrewsbury*[3] the scope and effect of rule 25A were considered by McCardie J. in *Patrick v. Havercroft*[4].

SHEIL J.: I agree and have nothing to add.

Appeal dismissed.

Solicitors for the appellants: *W. G. Wilson & Nesbitt.*
Solicitors for the respondent: *S. J. Diamond & Son.*

J.P.

[1] [1916] 1 I.R. 180.
[2] Unreported; 1944.
[3] [1922] P. 112
[4] (1920) 36 T.L.R. 290.

REG. v. BAILEY[1].

Criminal law—Act prejudicial to the administration of justice—Public mischief.

The appellant, who had made a false confession to the police implicating two other men and himself in a murder, was convicted on an indictment which described the offence as "Effecting a public mischief" and alleged in the particulars of offence that the appellant's false statements caused police officers, maintained at the public expense for the public benefit, to devote their time to the investigation of false allegations thereby depriving the public of their services and rendering subjects liable to suspicion, accusation and arrest.

Held by the Court of Criminal Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.) that the acts of the appellant were prejudicial to the administration of public justice and accordingly constituted an indictable common law misdemeanour.

The category of acts prejudicial to the administration of public justice is not limited to acts affecting the processes of adjudication but extends to acts affecting the police in their functions of investigating offences.

Held further that the description of the offence as "Effecting a public mischief" did not vitiate the indictment.

Rex v. Manley [1933] 1 K.B. 529 and *Reg. v. Newland* [1954] 1 Q.B. 158 considered.

APPEAL against conviction and sentence.

The appellant was convicted before Sheil J. on October 21, 1955, at the Belfast City Commission on an indictment charging him with effecting a public mischief. The particulars of the offence charged appear from the indictment:—

"William Henry Bailey, on the 6th day of July, 1955, in the "County of the City of Belfast, did by means of certain false state-"ments, to wit, that he, with two other men whose descriptions he "then gave, had participated in the murder of one, Samuel Strannix, "at Queen's Road, Belfast, on the 28th day of June, 1955, cause "officers of the Royal Ulster Constabulary, maintained at public "expense for the public benefit, to devote their time and services "to the investigation of false allegations thereby temporarily de-"priving the public of the service of the said public officers and "rendering liege subjects of the Queen liable to suspicion, accusation "and arrest, and in so doing did unlawfully effect a public mischief."

The evidence adduced by the Crown was not in dispute and substantiated the facts alleged in the statement of particulars. At the trial counsel for the appellant moved unsuccessfully to quash the indictment on the ground that it did not disclose a criminal

[1] In the Court of Criminal Appeal before Lord MacDermott L.C.J. and Porter and Black L.JJ.: Nov. 24, Dec. 2, 1955; Jan. 21, 1956.

offence, and the appellant was convicted and sentenced to twelve months' imprisonment.

The appeal against conviction was on the sole ground that the trial judge was wrong in law in refusing to quash the indictment and in not withdrawing the case from the jury.

Stewart Q.C. and *McGrath* for the appellant. No person can be found guilty of a public mischief unless he is a party to a conspiracy, and there is no ingredient of conspiracy in this case. Before the decision in *R. v. Manley*[1] there was no such offence known to the law, and that decision has now been discredited by *Reg. v. Newland*[2]. It seems to be now well established that the Court of Criminal Appeal can overrule a case which subsequently appears to have been wrongly decided: *R. v. Taylor*[3]. As a preliminary to a consideration of *Manley's* case[1] it is necessary to remember that the courts no longer have a law-making function. No doubt in ancient times the courts were not merely interpreters and administrators of the law but also to a large extent were law makers. The Court of Star Chamber had the power to decide that any particular set of circumstances could constitute a certain offence. In recent times, however, there has been a crystallization of that power, so that now Parliament is the sole law-making authority and it is no longer the function of the courts to fill in gaps in the criminal law.

The foundation of the decision in *Manley's* case[1] was the proposition enunciated in *R. v. Higgins*[4] by Lawrence J. that, "All "offences of a public nature, that is, all such acts or attempts as "tend to the prejudice of the community, are indictable." It is submitted that those words were far too sweeping to establish a principle and, in any event, were merely obiter. The question in that case was whether an attempt to commit a crime is itself a crime: see Russell on Crime, 10th ed. p. 1785. *R. v. Brailsford*[5] and *R. v. Porter*[6] were cited in *Manley's* case[1] as having approved the principle put forward by Lawrence J. but in both those cases there was the element of conspiracy. Apart from *Manley*[1] and *Kerr v. Hill*[7] all the cases concerned with public mischief involved a degree of conspiracy: *R. v. Bassey*[8]; *R. v. Young*[9]. Many of the cases in which the words "public mischief" appear were really

1 [1933] 1 K.B. 529.
2 [1954] 1 Q.B. 158.
3 [1950] 2 K.B. 368.
4 (1801) 2 East 5, 21.
5 [1905] 2 K.B. 730.
6 [1910] 1 K.B. 369.
7 [1936] S.C. (J.) 71.
8 (1931) 47 T.L.R. 222.
9 (1944) 30 Cr. App. R. 57.

cases of "public nuisance" if one accepts the classification in Archbold, 33rd ed. p. 1389 et seq. Prior to *Manley's* case[1] the facts proved here would not have constituted an offence. That decision was built on shifting sands, and considerable weight should be given to the criticism of it in *Newland's* case[2]. These two cases were considered in *Joshua v. Reg.*[3] but the point arose in an incidental manner and the court did not find it necessary to decide the conflict between them.

Topping Q.C. for the Crown. The conduct of the appellant upon which this charge is based amounted to a deliberate and calculated interference with the normal course of justice and in the submission of the Crown constituted a bad case of public mischief. There is no particular magic in the words "public mischief." The cases which fall under that heading differ but there is a clear thread running through all of them and that thread is to be found in the dictum of Lawrence J. in *Higgins'* case[4]. On the basis that the essence of the offence is a prejudice to the community there is a clear connection between all the cases, and until *Newland's* case[2] it was never suggested that conspiracy is a necessary element. The decision in *Manley's* case[1] is not only good law but good sense. The same principle was followed in the Scottish case of *Kerr v. Hill*[5]. In *Reg. v. Vreones*[6] Coleridge C.J. said: "I think that an attempt to "pervert the course of justice is in itself a punishable misdemeanour." *Newland's* case[2] does not purport to overrule *Manley*[1]. On the contrary Goddard L.C.J. expressly stated that it was a binding authority.

The giving of false information to the police is the modern equivalent of raising a false "hue and cry" which was always regarded as being a common law misdemeanour: see Lefroy's, Criminal Law of Ireland, 3rd ed. p. 124, and Hawkins', Pleas of the Crown, c. 12, s. 5.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. (delivering the judgment of the Court) stated the facts and continued: At the trial counsel for the accused moved unsuccessfully to quash the indictment on the ground that it did not disclose a criminal offence, and the sole grounds of the appeal are that the learned trial judge was wrong in law in refusing this application and in not withdrawing the case from the jury. The conduct of the trial and the judge's charge to the jury are not

1 [1933] 1 K.B. 529.
2 [1954] 1 Q.B. 158.
3 [1955] A.C. 121.
4 (1801) 2 East 5.
5 [1936] S.C. (J.) 71.
6 [1891] 1 Q.B. 360, 367.

complained of in any other respect and the only question for this court is, therefore, whether the indictment reveals an offence known to the law.

In *Rex v. Manley*[1], a case indistinguishable on its facts from this one, the Court of Criminal Appeal in England (Lord Hewart L.C.J., Avory and Branson JJ.) answered this question with a clear affirmative. And it is of interest to observe that shortly afterwards in *Kerr v. Hill*[2], the Court of Justiciary held that conduct similar to that in *Rex v. Manley*[1] constituted a crime according to the law of Scotland. Lord Normand, then Lord Justice-General, said, in the course of his judgment[3]: "Great injury and damage "may be caused to the public interest, which is mainly to be "regarded, by a false accusation, although no individual is named "or pointed at by the informer. A charge which is perfectly general, "and leaves the public at large open to suspicion, does nevertheless constitute a crime if it is falsely made....The point is that "the criminal authorities were deliberately set in motion by a "malicious person by means of an invented story. That is the "essence of the crime, and, when these essentials are present, I "think that a crime is committed."

And in the more recent Scottish case of *Gray v. Morrison*[4], this appears to have been accepted without question as part of the criminal law of Scotland.

After the decisions in *Rex v. Manley*[1] and *Kerr v. Hill*[2] and during the last war a number of individuals were indicted and convicted in this jurisdiction for effecting a public mischief by erecting, in deliberate disregard of the specification, air-raid shelters which were so grossly defective as to come much below the standard of protection they were designed to afford. It would seem that similar prosecutions took place in England, but the only case in the reports concerning this particular kind of mischief is *Rex v. Young*[5]. There, the Court of Criminal Appeal (Lord Caldecote L.C.J., Lewis and Asquith JJ.) confirmed the conviction of the appellant on a charge of conspiring with another to effect a public mischief "by building 120 buildings which they well knew would "be used by the citizens of the Borough of Hammersmith as air-"raid shelters, in a manner so deficient in structure as to fall far "short of the standard of protection afforded by the specifications "provided, and so as to cost the said council £17,674 of its moneys

[1] [1933] 1 K.B. 529.
[2] [1936] S.C. (J.) 71.
[3] Ibid. 75.
[4] [1954] S.C. (J.) 31.
[5] (1944) 30 Cr. App. R. 57.

"for the rebuilding of the said buildings in accordance with the "said specifications." This decision differs from *Rex v. Manley*[1] and the other unreported cases to which I have referred in that the offence charged was one of conspiracy, but the judgment of the court, which was delivered by Lord Caldecote, cites *Rex v. Manley*[1] without criticism and plainly accepts the proposition that "to effect or cause a public mischief is a misdemeanour."

The decision in *Rex v. Manley*[1], however, had been the subject of considerable criticism by text-writers, and in *Reg. v. Newland*[2], the Court of Criminal Appeal in England (Lord Goddard L.C.J., Sellers and Havers JJ.) questioned its reasoning in terms which, though obiter, were undoubtedly intended to convey a definite view. Thus, Lord Goddard, who delivered the judgment of the court, says[3]: "With all respect to a case which, as we have said, "is binding on us we believe that the right approach to what may "be compendiously called public mischief cases is to regard them "as part of the law of conspiracy, and to hold the actions of an "individual not committed in combination with others as indict-"able only if they constitute what has been held in the past to be "common law or statutory offences.... We need not further "enlarge on it, as the charge we are now considering was one of "conspiracy, except to say that in our considered opinion the safe "course is no longer to follow it."

In the following year the same question—whether apart from conspiracy there is a common law offence of effecting a public mischief—was argued before the Judicial Committee in *Joshua v. Reg.*[4], a case in which the accused was charged with effecting a public mischief by making false statements in a public speech. The Board, however, did not find it necessary to express an opinion on this point, though it dealt with the respective functions of the judge and jury on the trial of such a charge in a manner to which we shall refer later.

Such being the state of modern authority on the subject this court, which regards the decisions of the Court of Criminal Appeal in England on points of law with the greatest respect and normally follows them in the absence of some strong reason to the contrary, must now seek its own conclusion on this question. It will be a convenient approach to this task to consider some of the criticisms of *Rex v. Manley*[1] advanced in *Reg. v. Newland*[5].

1 [1933] 1 K.B. 529.
2 [1954] 1 Q.B. 158.
3 Ibid. at 168.
4 [1955] A.C. 121.
5 [1954] 1 Q.B. 158, 168.

In the latter case the court said: "The short judgment in *Rex v.* "*Manley*[1] while referring to *Rex v. Brailsford*[2] and *Rex v. Porter*[3], "apparently overlooked or at any rate makes no mention of what "in our opinion was an all-important factor in those cases, namely "that in both there was a charge of conspiracy." In *Rex v. Brails-* 5 *ford*[2], a Divisional Court (Lord Alverstone C.J., Lawrance and Ridley JJ.) held an indictment good which charged the defendants with conspiring to obtain a passport by false pretences, to (inter alia) "the public mischief" of the King's subjects. In delivering the judgment of the court Lord Alverstone said[4]: "It is not neces- 10 "sary for us to decide whether apart from conspiracy the obtaining "of a passport by false pretences....is of itself a misdemeanour; "but, as the question has some bearing upon the validity of the "conviction....we desire to make a few observations thereon." We think these observations suggest that the court thought such 15 conduct would be a misdemeanour, but no firm opinion is expressed on the point and, after several cases, including *Rex v. Higgins*[5], have been cited for the proposition that "the distinction "between acts which are merely improper or immoral and those "which tend to produce a public mischief has long been recog- 20 "nised" the judgment turns away from the question with the words[6]: "It is, however, unnecessary to consider this point further, "because we are clearly of opinion that the act done, namely, "the obtaining of a passport by a false pretence, is an act of the "kind which would render a conspiracy to carry it into effect un- 25 "lawful, and we think that both defendants have been rightly con- "victed of criminal conspiracy." Both *Rex v. Brailsford*[2] and *Rex v. Porter*[3] were mentioned in *Rex v. Manley*[1] by Lord Hewart C.J. as having referred to *Rex v. Higgins*[5] with approval. But the approval in *Rex v. Brailsford*[2] is only of the limited nature already 30 mentioned, and in *Rex v. Porter*[3] the judgment of the Court of Criminal Appeal (also delivered by Lord Alverstone), though it quotes from the judgment in *Rex v. Brailsford*[2], does not contain any direct reference to *Rex v. Higgins*[5]. The decision in *Rex v. Porter*[3] was that an agreement to indemnify the bail of an accused 35 person was, not only unenforceable, but an agreement to do something "which tended to produce a public mischief" and was therefore indictable as a conspiracy. This case does not carry the matter any further than *Rex v. Brailsford*[2] and neither of these cases seems

1 [1933] 1 K.B. 529.
2 [1905] 2 K.B. 730.
3 [1910] 1 K.B. 369.
4 [1905] 2 K.B. at 744.
5 (1801) 2 East 5.
6 [1905] 2 K.B. at 746.

to us to settle much outside the law of criminal conspiracy or to lead necessarily to the conclusion reached in *Rex v. Manley*[1]. It is, however, but right to observe that the court in *Rex v. Manley*[1] does not seem to have founded upon the *Brailsford*[2] and *Porter*[3] cases. It may have seen confirmation in them, but its decision was primarily based on something that had been stated over a century before in *Rex v. Higgins*[4]. Dealing with the question "whether it "is true at the present day to say that there is a misdemeanour "of committing an act tending to the public mischief," Lord Hewart said[5]: "In our opinion that question ought to be answered in the "affirmative. We think that the law remains as it was stated to be "by Lawrence J. in *Rex v. Higgins*[4]: 'All offences of a public nature, "that is, all such acts or attempts as tend to the prejudice of the "community, are indictable'."

The main criticism of *Rex v. Manley*[1] by the court in *Reg. v. Newland*[6] centres round the acceptance of this statement. It is described as a dictum, and so it was, for the decision in *Rex v. Higgins*[4], which was that an incitement to steal was a misdemeanour, certainly did not call for the formulation of such a general proposition. Lord Goddard also points out that none of the other judges in *Rex v. Higgins*[4] stated the law in such wide terms as Lawrence J., and he refers to the criticisms of the breadth of the dictum by Sir James Fitzjames Stephen in his History of the Criminal Law, vol. 3 p. 359, and by Dr. Stallybrass in the Law Quarterly Review, vol. 49, p. 183. Then comes this passage[7]: "In effect it would "leave it to the judges to declare new crimes and enable them to "hold anything which they considered prejudicial to the community "to be a misdemeanour. However beneficial that might have been "in days when Parliament met seldom or at least only at long "intervals it surely is now the province of the legislature and not "of the judiciary to create new criminal offences."

With the second sentence of this passage we would express our respectful concurrence. If the charge preferred against the appellant did not previously constitute an indictable offence this court has no duty and no jurisdiction to make it such. We think, however, that the first sentence of the passage requires some modification in the light of what was held by the Judicial Committee in *Joshua's* case[8]. In the judgment of the Divisional Court in *Rex v. Brailsford*[2] there is a suggestion that it is for the trial judge to

1 [1933] 1 K.B. 529.
2 [1905] 2 K.B. 730.
3 [1910] 1 K.B. 369.
4 (1801) 2 East 5.
5 [1933] 1 K.B. at 534.
6 [1954] 1 Q.B. 158.
7 [1954] 1 Q.B. at 167.
8 [1955] A.C. 121.

direct the jury as to whether, if the facts are established, they constitute the offence of effecting a public mischief. That seems to have been the view of the law followed by Lord Alverstone in his summing-up[1], and it was certainly the view taken by the Court of Criminal Appeal in *Young's* case[2]. We think that, if an offence of this nature exists, the question whether in fact the prisoner's conduct effected a public mischief should be treated as a matter of fact and determined by the jury, and we take the law on this particular point to be as laid down in that part of the judgment in *Joshua's* case[3] where Lord Oaksey says: "Their Lordships are "of opinion that it was for the judge to direct the jury as to the "elements of the crime of effecting a public mischief (assuming "that such a crime exists) and to direct them on the facts if he "thought that there was evidence to go to the jury, and it was for "the jury to find whether the appellant was guilty upon those facts. "It was a misdirection to tell the jury as a matter of law that they "must convict the appellant if they found that he had spoken the "words alleged. To do so was, in their Lordships' opinion, to "usurp the function of the jury."

This would leave the last word with the jury and not with the judge. But despite this modification, which we mention on account of its procedural importance, the substance of the criticism voiced by Lord Goddard remains. If the dictum of Lawrence J. in *Rex v. Higgins*[4] is to be taken at its face value, not only would one wide field of the criminal law lose all claim to certainty, but the guilt or innocence of persons charged within it could, to an unwholesome degree, depend upon the personal views or prejudices of those constituting the tribunal appointed for their trial.

We are of opinion that the criticism in *Reg. v. Newland*[5] of Lawrence J.'s dictum is well founded. We have not been referred to and have not discovered any satisfactory authority for such a sweeping proposition as it enunciates. In 1801, when *Rex v. Higgins*[4] was decided, many offences were known to the common law which had as their principal ingredient the doing of something that hurt or was likely to hurt the public interest. These, it is true, ranged widely as the following cases, taken by way of example from the reports, go to show:—*R. v. Curl*[6] (publication of obscene matter tending to corrupt public morals); *R. v. Lawley*[7] (attempting to persuade a witness not to appear); *R. v. Taylor*[8] (keeping large

1 [1905] 2 K.B. at 741, 742.
2 (1944) 30 Cr. App. R. 57.
3 [1955] A.C. 121, 129.
4 (1801) 2 East 5.
5 [1954] 1 Q.B. 158
6 (1727) 2 Str. 788.
7 (1731) 2 Str. 904.
8 (1741) 2 Str. 1167.

quantities of gunpowder in dangerous proximity to a church and houses); *R. v. White and Ward*[1] (causing offensive smells by the manufacture of sulphuric acid near a highway); *R. v. Vaughan*[2] (attempting to bribe a Privy Counsellor). But the categories and instances then established by precedent did not justify the width of Lawrence J.'s dictum. Both at that time and after it much in the way of conduct prejudicial to the community remained unpunishable. As Sir James Fitzjames Stephen said in *Reg. v. Price*[3]: "many acts involving the grossest indecency and grave public "mischief—incest, for instance, and, where there is no conspiracy, "seduction or adultery—are not misdemeanours." It may be that Lawrence J. did not intend to do more than describe in general terms what he regarded as the main characteristic of all the offences of a public nature which were then recognised. His words, however, in their natural meaning, go well beyond this and in so far as they do we cannot regard them as a competent extension of the criminal law. The general course of development in that branch of our jurisprudence has been to proceed from cases and to define categories and state principles with a close regard for authority. To hold the dictum of Lawrence J. well founded would be to affirm, not only a striking departure from that course, but a step which we cannot accept as within the province of the judiciary at the beginning of the nineteenth century. This, however, is not to say that the courts are bound to tread slavishly in the footsteps of precedent. It is still their function to apply established principles to changing conditions. As Sir James Fitzjames Stephen said in *Reg. v. Stephenson*[4], "In one sense we do create new offences, that is to say, "that as a court we can and do define the law from time to time "and apply it to the varying circumstances which arise." But that cautious and necessary process is one thing, and using a proposition (as was done in *Rex v. Manley*[5]) which reaches well beyond the settled law as a net to make amenable all who fall within it, is quite another.

Two further observations fall to be made regarding *Reg. v. Newland*[6]. In the first place, it was pointed out during the hearing of the present appeal that Lord Goddard said[7] "It is much too late "to object that a conspiracy to effect a public mischief is an offence "unknown to the law," and this was regarded as justifying the

1 (1757) 1 Burr. 333.
2 (1769) 4 Burr. 2494.
3 (1884) 12 Q.B.D. 247, 255.
4 (1884) 13 Q.B.D. 331, 337.
5 [1933] 1 K.B. 529.
6 [1954] 1 Q.B. 158,
7 Ibid. 165.

view that the court in that case would have seen no ground on which to question Elizabeth Manley's conviction had she been charged with agreeing with another to act as she did. The court, however, did not express itself in terms to that effect and it is perhaps doubtful whether such a view should be implied from its judgment. To imply such a view would raise a situation of some difficulty, for a simple agreement to make the false statement would leave the unlawful element to be found in the making of the statement and if that were not a criminal act it is not easy to see how otherwise it would be unlawful. On the facts of *Reg. v. Newland*[1], however, that kind of situation did not arise and it was unnecessary to examine closely the tortuous frontiers of criminal conspiracy. The second observation is this. Though *Manley's* case[2] was criticised in *Reg. v. Newland*[1] in a manner which might be taken as questioning the actual decision, we think the purpose of the court may have been to criticise the reasoning, based on the dictum of Lawrence J., on which the decision was founded rather than the decision itself. We therefore leave the judgment in *Reg. v. Newland*[1] in agreement with its conclusion respecting the foundation of *Rex v. Manley*[2] but having to turn to a further question on which it cannot render us the same assistance, namely, whether—apart altogether from *Rex v. Manley*[2] and the dictum of Lawrence J.—what the appellant did in this case was an offence known to the common law.

The catalogue of common law offences relating to conduct which harms or tends to harm the public interest is very extensive, and the classification of these offences by text-writers, as might be expected from the nature of the subject, has been somewhat arbitrary; but the criminal law has long recognised several fairly well defined categories of this type of offence and of these two in particular were discussed in the argument before us, namely—(1) the category of acts constituting what is known as a common nuisance, and (2) the category of acts prejudicial to the administration of public justice.

The common nuisance category is wide and the expression employs the word "nuisance" in a broad connotation as the "ad "commune nocumentum" of the older forms of indictment indicates. This category is subdivided in Archbold (33rd ed. p. 1390) into (a) acts which interfere with comfort, enjoyment or health; (b) acts dangerous to public safety; (c) acts injurious to public morals,

[1] [1954] 1 Q.B. 158. [2] [1933] 1 K.B. 529.

indecency or order; and (d) unlawful treatment of dead bodies. We think this classification may be taken as a sufficiently accurate analysis, for present purposes, of the relevant decisions. It is presumably under this category that the air-raid shelter cases would be classified.

While the cases comprehended in the common nuisance category exhibit a great diversity, we are of opinion that the charge against the appellant cannot fairly be brought within it. The difficulty in bringing the present charge within this category does not arise as respects the requirement of some injury, or threat of injury, to the public interest. It is the nature of the injury which, in our opinion, keeps the charge outside this category. No question of public comfort, enjoyment or health is involved. The acts alleged were not dangerous to public safety in any physical sense and did not affect morals, decency or order as those words are used in this connection.

The facts of the present case would obviously suggest that they might more readily be brought within the second category—that of acts prejudicial to the administration of public justice. But can they be brought within this category without creating an offence previously unknown to the law? As already indicated, we think the appropriate criterion is not the existence of some authority exactly on all fours with the present case, but whether the state of the law is such as to lead fairly and reasonably to the conclusion that what was done here fell within the ambit of this category. Again, no difficulty arises respecting the element of injury to the community. The appellant's conduct was clearly prejudicial to the public interest, for he acted in a manner calculated to divert the efforts and waste the time of those charged with the duty of bringing criminals to justice, and calculated also to render innocent citizens liable to suspicion and arrest. But, granted that element, was his conduct, in its substance, of a quality or kind which the law has already recognised as criminal? That seems to us the crucial question in this appeal and we turn to it at once.

Many of the offences known to the common law in this category are concerned with the administration of justice in the courts or with proceedings pending therein. Common law perjury, interfering with witnesses, embracery, the publication of matter calculated to prejudice a fair trial, may be cited as examples. A good modern instance is *Rex v. Greenburg*[1], in which an attempt to persuade

[1] (1919) 83 J.P. 167.

a witness to alter her evidence was held sufficient to support an indictment for the misdemeanour at common law of attempting to pervert the due course of law and justice. But the administration of public justice, particularly in the criminal sphere, cannot well be confined to the processes of adjudication. In point of principle we think it comprehends functions that nowadays belong, in practice almost exclusively, to the police, such as the investigation of offences and the arrest of suspected persons; and we see no good reason for regarding these preliminaries as beyond the scope of the category we are now considering. We find support for this view in *Reg. v. Vreones*[1], a decision of the Court for Crown Cases Reserved (Lord Coleridge C.J., Pollock B. and Stephen, Charles and Lawrance JJ.). In that case the defendant had been convicted on a count in an indictment which alleged, in effect, that a contract for the purchase of a cargo of wheat, shipped on a vessel bound for Bristol, provided that any dispute arising thereout should be submitted to arbitration; that the defendant was appointed by the sellers to take samples of the cargo on arrival at Bristol for use as evidence of quality should any such arbitration take place; that the defendant took such samples in sealed bags according to the custom of the port; and that afterwards, to deceive the arbitrators as to the quality of the cargo and "so as to pervert "the due course of law and justice," he removed the wheat from the sample bags and substituted therefor wheat of a different quality and value. In fact no arbitration was held and the evidence which had been thus fabricated was never used. Counsel for the defendant argued[2]: "The....count....states no criminal offence. There is "no averment that the evidence was ever tendered or used in any "proceeding; nor that any legal proceeding was ever in existence "in which it could be used; nor that any court or legal officer was "in existence before whom it could be used."

The court, however, unanimously held that the count showed a misdemeanour and affirmed the conviction. In the course of his judgment Lord Coleridge, after a reference to the samples said[3]: "They were not in fact so used; but I am of opinion that the defendant "was none the less guilty of a punishable offence. I think that an "attempt to pervert the course of justice is in itself a punishable "misdemeanour; and though I should myself have thought so on "the grounds of sense and reason, there is also plenty of authority "to shew that it is a misdemeanour in point of law." Pollock B.

[1] [1891] 1 Q.B. 360.
[2] Ibid. 365.
[3] Ibid. 367.

observed[1]: "It is an offence which comes within the description "in East's Pleas of the Crown, c. 18, s. 4: 'There is also another "head of public cheats indictable at common law, which are levelled "against the public justice of the kingdom, such as the doing of "judicial acts without authority in the name of another'; and the "author goes on to say: 'There is a precedent of an indictment "against a married woman for pretending to be a widow, and as "such executing a bail bond to the sheriff for one arrested on "a bailable writ. This perhaps was considered as a fraud upon a "public officer in the course of justice'." And Pollock B. added[2]: "The real offence here is the doing of some act which has a tendency "and is intended to pervert the administration of public justice."

On the authority of this decision, which so far as we are aware has never been questioned, we think it is beside the point that the appellant's false statement did not result in his trial for the murder or lead to the arrest of those whom he described to the police as his accomplices. And if that is so, we are further of the opinion that the difference of fact between that case and this, the false samples in one and the false statements in the other, are insufficient to keep the appellant's conduct outside the category we are discussing. Had he tampered with the scene of the crime so as to fabricate evidence against himself or others (as by leaving fingerprints or identifying articles) the cases would be substantially identical, and we are unable to see how making false statements with the same purpose and calculated to produce the same result can give the matter a different complexion in point of law.

On this aspect of the appeal counsel for the Crown drew our attention to a passage in Lefroy's Criminal Law of Ireland (3rd ed., 1865) at p. 124, which describes "Raising the hue and cry without cause" as a misdemeanour punishable by fine or imprisonment or both. This, translated into terms applicable to the modern process of arrest, adds support for the view we have expressed. The learned author cites Hawkins' Pleas of the Crown, c. 12, s. 5, but does not refer to decisions. The statement in Hawkins is, however, repeated in successive editions of Blackstone's Commentaries (see 1862 edition by Kerr, vol. IV p. 341). And a statement to the same effect is to be found in Comyn's Digest, 5th edition (1822) vol. IV at p. 466, and in Bacon's Abridgement, 7th edition (1832) vol. IV at p. 238. Since the hearing we have had an opportunity, through the courtesy of Professor Newark of Queen's University,

[1] [1891] 1 Q.B. at 368. [2] Ibid. 369.

of consulting the Calendar of Justiciary Rolls in Ireland kept in the University Library and find therein an entry under date June 15, 1297, for the County Tipperary, the material part of which is as follows:—

"It is found by the jury in which Ric. de Boyton plaintiff and "John de Turberuill, put themselves, that John assaulted Ricard "at Athissel, and raised hue upon him unjustly for injury done by John himself, to his damage of 20s. Judgment that Ricard recover "20s. John committed to prison."

The records of the Court of the Justiciary of Ireland of which this is an extract have unfortunately perished; but the extract itself goes to confirm the passage in Lefroy and to show that a deliberate attempt to get the wrong man arrested was regarded as criminal in Ireland soon after the introduction of the English common law.

For these reasons we hold that the particulars of the charge against the appellant describe an indictable offence. It remains to consider whether the description of the offence as "Effecting a "public mischief" is fatal to the Crown case. Our conclusion is that these words do not vitiate the indictment. Though it may be said that "Attempting to pervert the course of justice" would be a closer and more pointed description, the expression used does not misdescribe the offence and has not embarrassed the accused in any way.

The conviction must therefore be affirmed and we so hold.

Appeal dismissed.

Solicitors for the appellant: *Bernard Campbell & Co.*
Solicitor for the Crown: *Crown Solicitor for Belfast.*

S.M.M.

FOSTER and McWILLIAMS v. CUNNINGHAM & OTHERS[1]

Conacre letting—Death of tenant for life—Apportionment of conacre rent.

On the death of a tenant for life during the currency of a conacre letting, the rent paid in respect of the whole period of the letting is apportionable between the personal representatives of the tenant for life and the remainderman as if it had accrued from day to day.

ORIGINATING SUMMONS.

By will dated April 19, 1952, James McWilliams, who died on September 3, 1952, left his farm to his executors, Cecil Foster and John McWilliams, in trust for his wife, Elizabeth McWilliams, for life with remainder to his two nieces. On March 23, 1954, the executors made a conacre letting of portion of the farm for a period terminable by custom on November 1, 1954. Elizabeth McWilliams died on July 7, 1954, having appointed Sarah Cunningham her executrix. At the request of the remaindermen and the said Sarah Cunningham the executors of James McWilliams brought these proceedings for the purpose of determining who was entitled to the conacre rent of £267 13s. 9d. in respect of the letting.

Reid for the plaintiffs.

Conaghan for the defendants.

Cur. adv. vult.

CURRAN J.: This case appears to me to be covered by the decision of Wilson J. in *Swan v. Kane*[2], an unreported case heard in 1931. In that case, as in the present, the tenant for life died during the currency of a conacre letting, and Wilson J. made an order declaring that the personal representatives of the tenant for life were entitled to the conacre rent proportionately as if it had accrued from day to day, and therefore apportioned the rent between the estate of the tenant for life and the remainderman. That decision corresponds with my own view in the present case and I have no hesitation in following it.

On the death of the tenant for life, the remainderman, it is conceded, was not bound by the conacre letting. He tacitly acquiesced, however, in the continuance of the grazing, and now claims to be entitled to the full grazing rent notwithstanding that it is, in part, in respect of grazing from March 23, 1954, until July 7, 1954, during which period the tenant for life was alive and the only person entitled. If it is necessary to infer that on the death of the

[1] In the Chancery Division before Curran J.: Dec. 12, 19, 1955.
[2] Unreported; 1931.

tenant for life a new contract was entered into between the conacre tenant and the remainderman, what terms are to be inferred? Could it be inferred that for the period from July 7, to November 1, 1954, the full amount payable in respect of the period March 23, to November 1, was to be paid, thereby giving the remainderman the benefit of a period of grazing during which the tenant for life was alive? I am not prepared to make such an inference. In my view the conacre tenant must be presumed to have been allowed to continue his grazing on the terms that he would pay what he had agreed to pay, the sum of £267, in respect of the period March 23 to November 1, 1954.

It is my opinion, therefore, that the monies paid in respect of the whole period must be apportioned as if they had accrued from day to day, and the amount found to be due on this basis for the period March 23 to July 7, 1954, must be paid to the representative of the tenant for life.

Declaration accordingly.

Solicitors for the plaintiffs: *Crozier & Emerson.*
Solicitors for the defendants: *Monroe & Anderson.*

S.M M.

WILLIAMSON v. HONEYFORD[1]

Damages—Loss of expectation of life—Child aged seven years—Basis of assessment.

An award of £1,200 as damages for the loss of expectation of life of a child aged seven years must be considered as excessive and inconsistent with the decision of the House of Lords in *Benham v. Gambling* [1941] A.C. 157, even allowing for the depreciation in the value of money since that case was decided. So *held* by the Court of Appeal (Lord MacDermott L.C.J., Porter L.J. and Sheil J.), which by a majority substituted the sum of £450 as a proper award.

APPEAL from a judgment entered for the plaintiff in an action tried before Black L.J. and a jury.

The plaintiff sued under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, as administrator of his seven year old son, claiming damages for the son's loss of expectation of life and funeral expenses. The son was killed when a motor car driven by the defendant collided with him on the highway.

The jury found that the defendant was negligent and assessed damages at £1,200, but having further found that the accident was in part caused by the boy's contributory negligence they reduced the damages by one-quarter to £900, and judgment was entered for the plaintiff for this sum together with the sum of £18 10s. 0d. for funeral expenses.

The defendant appealed, and the case is reported on appeal only on the issue of damages.

Jones Q.C. and *Moody* for the appellant.

McVeigh Q.C., *Stewart Q.C.* and *O'Donnell* for the respondent.

LORD MACDERMOTT after dealing with the other grounds of appeal continued: Put shortly, the case for the appellant on the question of the quantum of damages is that the figure assessed by the jury is quite incompatible with the guidance given by the House of Lords in the well known case of *Benham v. Gambling*[2]. That case was in respect of the death, in 1938, of a child of two and a half years as the result of a motor accident. Asquith J., as he then was, sitting without a jury, fixed the damages at £1,200 and the Court of Appeal held that the award should stand. The House of Lords, however, thought it was too much, and in the circumstances of the present case, its opinion, which is to be found in the speech

[1] In the Court of Appeal before Lord MacDermott L.C.J., Porter L.J. and Sheil J.: April 25, 26, 1955.
[2] [1941] A.C. 157.

of Lord Simon, has been closely canvassed before us. The House thought that a proper amount would be £200 and that even that sum would be excessive had the infant's circumstances not been favourable. Lord Simon says[1]: "In reaching this conclusion, we "are in substance correcting the methods of estimating this head "of loss, whether in the case of children or adults, which have "grown up in a series of earlier cases, and which Asquith J. naturally "followed, and are approving a standard of measurement which, "had it been applied in those cases, would have led, at any rate "in many of them, to reduced awards. I trust that the views of "this House, expressed in dealing with the present appeal, may "help to set a lower standard of measurement than has hitherto "prevailed for what is in fact incapable of being measured in coin "of the realm with any approach to real accuracy."

The observations of Lord Simon indicate quite clearly the impossibility of finding any reliable yardstick in relation to claims of this kind, involving as they do an attempt to value the happiness of human life. Indeed, there are many who think that it was an unfortunate amendment of our law which made such claims possible. In the present case, were it not for the guidance afforded by the House of Lords I would have found it hard to say in what respect the jury had gone wrong. In the circumstances, however, I am of opinion, after making due allowance for the depreciation in the value of money since 1940, that the award here was quite inconsistent with the decision in *Benham v. Gambling*[2] which is equally binding whether the trial be with or without a jury. Accordingly my conclusion is that the verdict for £1,200 cannot stand.

On this view a question of difficulty might well arise as to whether the case should go back on the issue of damages alone, or whether all the issues should be left open. However, I need say no more about that because counsel on both sides have agreed that, in the event of this court finding the damages awarded by the jury to be excessive, we should proceed to fix a sum in lieu thereof.

Coming now to the proper measure of damages, and emphasizing that I deal with this question only on the consent of the parties, it is necessary to have regard to the fact that the child in this case was older than the child in *Benham v. Gambling*[2]. It was pointed out in argument that a child of seven has a better grip on life than a child of two and a half. There is, no doubt, something in this, but it is difficult to assess its value. A further consideration is that

[1] [1941] A.C. at 168. [2] [1941] A.C. 157.

the deceased had a good home and would appear to have had a reasonable prospect of a happy life. I must also take into account the fact that the value of money has fallen sharply since 1940 when *Benham v. Gambling*[1] was decided in the House of Lords. In all the circumstances, and coming to the best conclusion I can, I think that the total damages might reasonably enough be put at a figure of £450; and deducting one quarter in respect of contributory negligence, this would make the net damages, including the sum of £18 10s. 0d. for funeral expenses, £356.

In my opinion, therefore, the appeal should be allowed on the question of damages, substituting the figure of £356 for that of £918 10s. 0d. found by the jury.

PORTER L.J.: I agree with the general principle stated by the Lord Chief Justice, and that the amount awarded by the jury was too high, but think it important to say that in this case a different standard of measurement may apply from that laid down in *Benham v. Gambling*[1]. Now this case does differ in some respects from *Benham v. Gambling*[1] and in my opinion the sum mentioned by the Lord Chief Justice is too small, taking into account that this was a bright boy with good prospects, that he was older than the child in the other case and the fact that the value of money has fallen. However, it is not necessary for me to mention what I think to be the proper figure in view of the fact that the majority opinion differs from my own.

SHEIL J.: I agree with the judgment of the court affirming the verdict of the jury with regard to the appellant's liability, and that being so, having regard to the decision in *Benham v. Gambling*[1] and taking into account all the circumstances of the present case, I am of opinion that the assessment of damages arrived at by the Lord Chief Justice is right.

Appeal allowed on question of damages.

Solicitor for the appellant: *H. J. Catchpole.*
Solicitors for the respondent: *Fisher & Fisher.*

S.M.M.

[1] [1941] A.C. 157.

NOTE

DOHERTY v. JAS. MURLAND Ltd. and ANOTHER[1]

Damages—Personal injuries—Expectation of life.

The plaintiff, a man aged 54 years, who had spent his working life as a labourer on farms, roads and in quarries and whose wages averaged £5 a week, suffered injuries in an accident as a result of which he sustained a fracture of the base of the skull and a dislocation of the spine, the upper part of which was locked in an abnormal position so that a jolt might cause further dislocation injuring the spinal cord and resulting in a slow fatal paralysis. There was also a risk of supervening epilepsy. The medical evidence, which was uncontradicted, assessed the risk of epilepsy as being under 10 per cent., and that of a jolt causing paralysis as somewhat less. In an action for damages for personal injuries the jury assessed the damages at £2,250.

The plaintiff appealed on the ground that the amount awarded was grossly inadequate. The Court of Appeal (Porter and Black L.JJ. and Curran J.) held that the test was whether there was any reasonable proportion between the award and the loss sustained, and applying this test a majority of the Court (Porter L.J. and Curran J.) set the verdict aside and ordered a new trial. Porter L.J. considered that the smallness of the award indicated that the jury had ignored or grossly underestimated the fact that though the medical evidence suggested that death might occur within a year or two that evidence indicated that there was a much greater chance that the plaintiff might survive for 15 or 20 years in pain and discomfort. Curran J. considered that even if the jury took the view that the plaintiff's normal expectation of life of 20 years had been reduced by 50 per cent. to 10 years, the loss of earnings alone (less £586 in respect of State benefits) would give a figure of £2,014, leaving merely £236 to cover all the other items of damage including loss of expectation of life, pain and suffering, incapacity, etc.

Black L.J. dissented on the ground that the jury was on the evidence entitled to consider that the plaintiff's expectation of life had been shortened to, say, 5 years, and on this footing the loss of earnings (less State benefits) would amount to approximately £700, and if damages for loss of expectation of life were assessed at £300 this

[1] In the Court of Appeal before Porter and Black L.JJ. and Curran J.: March 31, 1955.

would leave £1,250 to cover pain and suffering, incapacity, etc. Such an award was, in his Lordship's opinion, an extremely meagre one, but not one at which no twelve sensible jurors could arrive.

J.P.

SAMUEL McCAUSLAND v. MINISTRY OF COMMERCE[1].

Industry—Re-equipment of industry—Industrial undertaking—Manufacture of goods—Processing of ryegrass seed—Re-equipment of Industry Act (Northern Ireland), 1951 (14 & 15 Geo. 6, c. 2), s. 13.

The Re-equipment of Industry Act (Northern Ireland), 1951, provides for grants towards the re-equipment and modernisation of industrial undertakings, and section 13 of that Act defines "industrial undertaking" as meaning any person or body of persons engaged in "the manufacture of goods."

A company carried on the business of processing, machining and marketing ryegrass seed. The processing and machining consisted of drying the seed and passing it through a series of sieves and mechanical separators which removed foreign matter, seeds other than ryegrass seed and defective ryegrass seed and reduced it in bulk by approximately one-twelfth. The resultant bulk was not less than 98% pure ryegrass seed.

Held, by the Court of Appeal (Lord MacDermott L.C.J., and Porter L.J., Black L.J. dissenting) that though the company did not manufacture individual seeds, yet it did produce a different commodity from an unsorted bulk, namely pure ryegrass seed which was marketable for seeding purposes, and that this production of the commodity by means of a series of complicated mechanical processes constituted a "manufacture of goods" for the purposes of the Act.

Decision of Curran J. reversed.

APPEAL from an order of Curran J.

The plaintiff company which carried on the business of processing, machining and marketing ryegrass seed applied under the provisions of the Re-equipment of Industry Act (Northern Ireland), 1951, for a grant towards expenditure to be incurred by the company in modernising and re-equipping its premises. The defendant Ministry refused the application on the ground that the company was not engaged in the manufacture of goods and was therefore not an industrial undertaking within the meaning of the Act. The company thereupon took out an originating summons for the determination of the question of the construction of the term "industrial undertaking" used in the Act. On the hearing of the summons Curran J. held that the processes carried on by the company were not processes of manufacture, and the company appealed from this decision.

[1] In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.: Jan. 26, 27; April 22, 1955.

The facts of the case are fully set out in the judgment of the Lord Chief Justice.

Jones Q.C. and *MacDermott* for the appellant company.
Nicholson Q.C. and *Lowry* for the Ministry.

Cur. adv. vult.

Lord MacDermott L.C.J.: By the Re-equipment of Industry Act (Northern Ireland), 1951 (hereinafter referred to as "the Act"), the Ministry of Commerce was empowered, subject to certain conditions, to pay to "an industrial undertaking" a grant in aid of expenditure incurred in its re-equipment or modernisation. It is unnecessary to specify the conditions further than to say that before making a grant the Ministry must (a) be satisfied that the re-equipment or modernisation of the undertaking in question would increase its productive efficiency, and (b) have regard to the effect that such an increase would have on the industrial and economic development of Northern Ireland. These provisions are contained in subsections (1) and (2) of section 1 of the Act and may be taken as indicative of its main purpose.

The appellant company (hereinafter called "the company") made application for a grant under the Act but this was refused by the Ministry on the ground that the company was not an industrial undertaking as defined by section 13 which says that "In this Act "the expression 'industrial undertaking' means any person or body "of persons whether corporate or unincorporate engaged in Northern "Ireland in the manufacture of goods or the processing of goods "in the course of manufacture. . . ." The company thereupon issued an originating summons for the determination, as a matter of construction, of the issue thus raised. This procedure was made possible because the material facts, which are set out in the affidavit of Mr. William Stephen Gilbert, the company's chairman, are admitted. On the hearing of the summons Curran J. held that the company did not come within the definition of "industrial under-"taking" and answered the questions submitted to him accordingly. It is from that decision that the company now appeals.

It was conceded that the part of this definition which refers to "the processing of goods in the course of manufacture" was not in point and that the appeal depended on whether the company is "engaged. . . .in the manufacture of goods" as those words are used in section 13. I therefore turn to the nature of the company's

business and of what is done upon its premises which are situate at 36 and 38 Victoria Street in the City of Belfast.

The company is one of fifteen undertakings in Northern Ireland which are engaged in the processing, machining and marketing of ryegrass seed. This particular activity is of some importance in the economy of Northern Ireland. Ryegrasses form the basis of most seed mixtures used for sowing down grassland in many parts of the world and it has long been known that both perennial and Italian ryegrasses can be grown exceedingly well for seed saving in Northern Ireland. This finds reflection in the fact that of all ryegrass sown for seed in the United Kingdom some 93 per cent. is grown in Northern Ireland. Most of this crop is exported for seed to the rest of the United Kingdom and throughout the world after it has been processed and machined by the fifteen undertakings already mentioned. This processing and machining plays an important part in the ryegrass seed trade. As the law now stands, ryegrass cannot be sold for seeding purposes until it has been processed and machined to a very high standard of purity. This standard is laid down by the Ministry of Agriculture for Northern Ireland and varies within comparatively narrow limits according to the grades that are recognised for the marketable product. In the case of perennial ryegrass seed the top grade must have a minimum purity of 98 per cent. and this becomes 98.5 per cent. in the case of Italian ryegrass. Above this there are special standards which go as high as 99.9 per cent. purity, and seed to be sown for seed production in Northern Ireland must be of at least 99 per cent. purity. By schemes made by the Ministry of Agriculture under various statutes the ryegrass crop is purchased after harvesting each year by the Ministry from the farmers. The machiners (including the company) act as the Ministry's agents for the purposes of buying the crop, handling, machining and selling it.

Such in outline is the general nature of this trade and I must now speak in more detail of the part played by the company. Having collected the harvested ryegrass seed from the grower the company takes it to its premises in Victoria Street. When the crop arrives there it contains impurities in many forms, such as dust, the seeds of various types of weeds, chaff, inert seeds and the seeds of useless or noxious grasses. In addition it may also be damp. To separate the ryegrass from these impurities, and to obtain a marketable product suitable for sale for seeding purposes, necessitates a highly complex and skilled series of processes. As a result of these, a given quantity of the harvested seed (which I shall refer

to hereinafter as "the crop") will yield a certain amount of grade A seed. The residue is then processed again and a quantity of lower grade seed is produced; but after this processing and reprocessing there is always a certain residue which is quite useless for seeding purposes. The relative proportions falling within the categories mentioned may be gathered from the following example. A twenty-four ton lot of crop will produce about eighteen tons of grade A seed. The residue of six tons will, on reprocessing, produce about four tons of an inferior but still marketable grade of seed, leaving two tons, or one-twelfth of the intake, as a waste product which cannot be disposed of for seeding purposes. The system of processing and machining adopted by the company is the result of many years experience and research in the elimination of weeds and impurities. The treatment given to perennial ryegrass and the plant used in connection therewith are similar to the treatment given and the plant used in connection with Italian ryegrass which is a semi-annual or annual grass producing a large bulk of herbage quickly. Mr. Gilbert's affidavit describes the various processes followed in respect of perennial seed and I must now refer to these sufficiently to indicate the elaborate nature of the steps taken to convert the crop into the finished product that leaves the company's premises.

Described in general terms, the machining plant consists of a combination of sieving, rotating, hopping, fanning and cylindering devices which has been found to give the best results in separating the healthy seed from weeds and impurities. This plant is housed in a four-storey building up and down which the seed passes three times before emerging in its final state. When received the crop is emptied into a large loft from which it goes through some ten mechanical processes, each designed to separate or remove extraneous matter of various kinds. Coarser sieves are used for removing such substances as stones, straw, oats and other impurities. Then finer sieves are employed for "girth separations" by which different varieties of grasses other than that being produced are removed from the bulk, sieves of different degrees of fineness being used for the removal of different species of seed. Then certain species of seed which do not yield to the process of "girth separation" have to be removed in revolving cylinders set at an angle and with a series of indentations in their inner surfaces of a size to trap the particular kind of seed which it is desired to eliminate. In addition to these devices aspirators are also used for the purpose of making a fine

differentiation between pickles of varying weight and to remove empty and badly filled glumes that are unlikely to germinate. After passing through these processes and the ingenious machines by which their purposes are effected, and after a process of drying where necessary, the seed is delivered to a blending room. There it is mixed and from there it passes down spouts to be packed into bags, from every one of which a sample is drawn for testing at the Seed Testing Station.

What is thus produced is a marketable commodity and, as I have already indicated, the subject of a considerable export trade. Commercially it is something quite different from the crop. It commands a much higher price, conforms to a high standard of purity and, unlike the crop, can be used for seeding purposes. But in producing this commodity from the crop has the company been engaged in "the manufacture of goods"? In giving a negative answer to this question Curran J., in the course of his judgment, said: "I must confess that from the outset my view was that rye-"grass seed is not manufactured, it is grown, and that the processes "of cleaning and purifying, however complicated, are processes in "the nature of extraction and not of manufacture." What, then, are the "goods" which the company says it manufactures? If they are to be regarded as the individual seeds that pass through the various processes I have described, it would seem that Curran J. was unquestionably right in the conclusion he reached. On any view of the scope and meaning of the word "manufacture" it would, in my opinion, be as much an abuse of language to apply it to an individual seed that passes through the company's premises as it would be to apply it, say, to an individual egg that emerges graded, tested and marked from a packing station, no matter how much may have been gained commercially by such processes. For the company, however, it was contended that the definition contained in section 13 of the Act must be applied not to the individual seed but to the purified ryegrass seed in bulk. I have no doubt that this is the right view and that the relevant "goods" in this case are the seed in bulk. To hold otherwise would be to lose all touch with reality. Though most of the various contrivances used by the company operate upon the dimensions and characteristics of individual seeds, what is being dealt with from first to last is seed in bulk and nothing else. As Scrutton L.J. observed in *Bailey v. Potteries Electric Traction Company*[1], "A seed is never sold by

[1] [1931] 1 K.B. 385, 495.

"itself commercially, and I think the article to be altered or adapted "for sale is the article to be sold, i.e. a bulk, not an individual item "which is never sold by itself." Now, Scrutton L.J. was there dealing with a derating case which involved a consideration of the definitions in the Factory and Workshops Act, 1901. This explains the references to alteration and adaptation for sale, but the reasoning seems clearly applicable to the point now under consideration. If one asks what goods the company produces one must, I think, look at the matter commercially and see what it is that is being produced for sale. And the answer is to my mind quite clear: the goods produced by the company are seed in bulk.

That, however, is not the end of the matter because it seems to be possible to work upon and change the commercial value of bulk goods without engaging in a manufacturing process. In *Commissioner of Valuation v. McAllister*[1], a derating appeal, this court held that premises used for the sorting, grading and testing of eggs were used for "the adapting for sale of any article" within the meaning of section 149 of the Factory and Workshop Act, 1901. That decision was based on the view that the article in question was not the individual egg but eggs in bulk; but I do not think it would occur to anyone to say that the bulk which was thus sorted, tested and packed, and in that way made a marketable commodity, was manufactured either on the premises concerned or anywhere else. On the other hand, there can be little doubt that many processes of a refining or purifying character may be manufacturing processes, and none the less so because the raw material is a natural product whose essential qualities remain unimpaired by the treatments received. One can, of course, only reach a firm conclusion in any given case after examining the relevant operations and their consequences; but subject to that consideration, it does not seem to me—if I may illustrate what I have said by a couple of examples —that there would be anything incongruous or inapt about describing the conversion of crude petroleum into motor spirit or the production of table salt from rock-salt as a manufacturing process. How, then, is the statutory scope of the word "manufacture" to be determined for present purposes? I think the answer to this question demands enquiry under three heads: (1) the ordinary meaning of the word, (2) the nature and effect of the relevant operations and processes, and (3) the requirements of the context within which the word is used.

[1] [1954] N.I. 54.

As to head (1), I see no reason to reject the meanings that are given to the verb in the shorter Oxford Dictionary, namely, "to "work up (material) into forms suitable for use" and "to produce "by labour (now especially on a large scale)." In neither of these meanings is there anything which obviously disposes of the company's contention, but it is plain that expressions such as "work "up" and "produce by labour" will not be satisfied by every form of activity, for some operations—like drying cloth or shelling peas—may be too simple or too ancillary to rank in themselves as a manufacturing process.

That brings me to head (2) and what is done by the company in producing the seed it sells. Is that so simple or so ancillary to the handling of a natural product as to fall outside the common use of the word "manufacture"? I do not think so. That the process is not simple but complicated is manifest from what has already been said in describing it; and far from being ancillary its purpose is an end in itself, the production of a commodity different from the crop not only in content but in quality, and so different as to enter a marketable category which, by its usability for seeding purposes, is quite distinct from that of the crop. In *Bailey v. Potteries Electric Traction Company* Scrutton L.J. said in dealing with the derating claims of seed-cleaning and rag-sorting merchants[1]: "The "original bulk may be such that it cannot be sold either legally, "as in mixed seeds, or commercially, because an unsorted bulk "is not wanted, and the process of sorting may be so complicated "and mechanical as to deserve the title of a manufacturing process, "i.e., of 'adapting for sale.' On the other hand, the bulk and the "article to be sold may be so similar and of such a nature, such "as taking a quarter of a pound of bulls-eyes out of a bulk in a "bottle, that the separation or sorting may well be regarded as "an entirely minor incident of the sale or distribution." I do not forget that this passage was directed to a different definition and that an industrial hereditament for derating purposes is not necessarily the hereditament of an industrial undertaking as defined by the Act I am now considering. Nevertheless, it seems to me that the distinction drawn by Scrutton L.J. is a helpful test in deciding whether a given industrial procedure can fairly be described as a manufacturing process. I do not wish to overstress the fact that that very expression is to be found in the passage quoted. But Scrutton L.J. chose his language with care and when one gets a

[1] [1931] 1 K.B. 385, 494.

marked and significant change brought about in the make-up and quality of bulk goods by a series of elaborate mechanical processes there does not seem to be anything inappropriate or out of the way about describing what is done as a manufacturing of goods. The circumstance that each seed in the bulk produced by the company may have passed through all the processes without appreciable physical change does not appear to me to justify a different conclusion once it has been held that the goods in question are the seed in bulk. That accepted, the change accomplished is physically appreciable and commercially vital. Moreover, it reflects what has actually happened in the company's premises whereas the single seed tells at most but a part of the story. In short, the bulk with which we are now dealing is much more than an aggregation of individual seeds; it has a utility, a quality and a worth which are due to and cannot be dissociated from the processes carried out in the company's premises. One cannot, as it seems to me, decide this case merely by looking at the goods and giving them a physical description. One must also consider how they came to be what they are and what the company has done to the crop in order to obtain the finished product.

The question is, of course, to a large extent one of degree, but coming to the best conclusion I can in the light of the considerations I have mentioned I am of opinion that the company is, according to the natural meaning of the words, "engaged in the manufacture "of goods."

It remains to consider head (3) and to enquire whether there is anything in the Act to modify this conclusion by restricting the ordinary meaning of "manufacture." I can find no provision which would have this effect. On the contrary, it seems to me that the avowed purpose of the Act, if not such as to warrant giving the word a wider meaning than it would ordinarily bear, is certainly such as to discourage any limited or narrow construction of it.

On these grounds I would allow the appeal.

Porter L.J. after stating the facts continued: Counsel for the Ministry argued that the word "manufacture" in section 13 should receive its natural and ordinary meaning, that is to say, the making of articles or material by manual labour or mechanical power, but ryegrass seed, he said, is not made or manufactured, it is grown. As an agricultural product it is purchased by the company for

processing and machining, but after passing through these operations it remains an agricultural product, the same both in form and substance as it was before the processing and machining. There is no conversion of a raw material into a new and different substance, no combination or putting together of component parts into a finished article. The production of ryegrass seed is therefore not a "manufacture of goods."

On the other hand counsel for the company contended that the term manufacture ordinarily means not only the making of articles, but also the making up of articles, and that where you have a crop, which cannot legally be sold to the public, altered so that all impurities and foreign elements are eliminated and it becomes a new different and marketable product, you are entitled to say that the processes through which the crop has passed are manufacturing processes and that the ryegrass seed is the product of manufacture. With regard to the argument that all the processes and machining effected no alteration whatever of the substance of a particle of seed, he said that no one was concerned with the buying or the selling of a single particle of ryegrass seed. The seed was bought from the farmer in bulk, and sold in bulk to the purchaser. When one considers that the seed is bought and sold and dealt with in bulk and not otherwise, it is clear that the various processes and machining which have cleaned, sorted, separated, graded and blended the seed, and eliminated all impurities, foreign and noxious seeds and matters, and also reduced the bulk, have made it something which it was not before, that is a commodity which complies with the requirements of the Ministry and can be legally sold in the market in accordance with the statutory regulations.

For the company strong reliance was placed upon the opinion of Scrutton L.J. in *Hines v. Eastern Counties Farmers Co-operative Association Ltd.*[1], which was cited with approval by Lord Dunedin in the House of Lords[2]: "In my view, there was both alteration "of substance and adapting for sale in sorting, making a sub- "stantially different article in bulk from that which existed before "the processes were applied. In my opinion, you cannot deal with "the case by saying that there was a seed before the process and "the same seed after the process. The process has altered the bulk "and made it legally and commercially saleable."

The question in that case was whether a seed merchant's premises were an "industrial undertaking" within the meaning of section 3(1)

[1] [1931] 1 K.B. 446, 504. [2] [1931] A.C. 446, 483.

of the Rating and Valuation (Apportionment) Act, 1928. The premises were used for the cleaning and preparation of seeds by the use of machinery and the processes used appear to have been the same as in the present case, but in addition to cleansing, sorting, grading and preparing for sale, there was also a decorticating process—which is absent in the present case.

Notwithstanding the fact that *Hines'* case[1] was tried under a different Act and that there is no mention of a decorticating process by the company, although some measure of decortication must have taken place in the various processes I have mentioned, I think that the passage which I have cited must be deemed to be an authoritative statement of the view to be taken when a question arises about the treatment or processing of seeds as in this case.

The processing and machining have changed what was a mass of heterogeneous seeds and other foreign substances into a homogeneous, marketable commodity, smaller in bulk but cleaned, sorted, graded, bagged and adapted for sale as "ryegrass seed" in accordance with the Ryegrass Seed (Temporary Provisions) Act (Northern Ireland), 1949, and the Ryegrass Seed (Temporary Provisions) (Extension) Act (Northern Ireland), 1950, and the Regulations made thereunder.

In my opinion the production of ryegrass seed in this manner by the company is a manufacture of goods within the meaning of section 13. The appeal should therefore be allowed.

Black L.J.: The question for decision in this appeal is whether the operations carried on by the appellant company in processing and machining ryegrass seed as described in the affidavit of Mr. William Stephen Gilbert, one of the company's directors, are such as to constitute the company an "industrial undertaking" within the meaning of the definition contained in section 13 of the Re-equipment of Industry Act (Northern Ireland), 1951, to which I shall refer as the Act of 1951. It is unnecessary for me to describe the operations of the appellant company with which the case is concerned as this has already been done in the judgment just delivered by the Lord Chief Justice.

The Act of 1951 is one of a series of statutes passed by the Parliament of Northern Ireland for the purpose of enabling financial assistance to be provided for the encouragement and development

[1] [1931] 1 K.B. 446; [1931] A.C. 446.

of industrial undertakings in the Province. The class of industrial undertakings which may be so aided under the provisions of any particular statute depends on the definition of industrial undertaking contained in the relevant statute and it may be of some importance to note that the definition varies from statute to statute. It would appear that in some cases the Legislature intended that the range of industrial undertakings qualified to benefit should be wider and in other cases that it should be narrower. Thus in section 11 of the Industries Development Act (Northern Ireland), 1945, "industrial undertaking" is defined as including "any under- "taking by which any process for, or incidental to, any of the fol- "lowing purposes is or is intended to be carried on, namely—(a) "the making of any article or substance or part of any article or "substance; or (b) the altering, repairing, ornamenting, finishing, "cleaning, washing, preserving, packing or canning or adapting "for sale or breaking-up or demolition of any article or sub- "stance.... being a process carried on in the course of a trade or "business." This definition is obviously founded upon the definition of "factory" in section 157 of the Factories Act (Northern Ireland), 1938. It is clear that the operations carried on by the appellants in the present case would qualify them as an industrial undertaking within this definition inasmuch as the processes to which the ryegrass seed are subjected in their premises undoubtedly amount to a cleaning and adapting for sale of the seed. If the question at issue in this appeal had arisen upon the definition in the Act of 1945 and not upon the definition in the Act of 1951 it would of course be concluded in favour of the appellant company by the decision of the House of Lords in *Hines v. Eastern Counties Farmers' Co-operative Association Limited*[1].

Again by the recent Capital Grants to Industry Act (Northern Ireland), 1954, industrial undertakings in respect of which grants may be paid under that Act are defined as including (inter alia) "any undertaking carrying on a trade which consists in the manu- "facture of goods or materials or the subjection of goods or materials "to any process." I would apprehend that if a question such as that in the present appeal arose upon this definition in the Act of 1954 it could hardly be argued that the appellant company's operations do not amount to the subjection of the ryegrass seed to a process within the ambit of the definition.

The question, however, in the present appeal does not turn upon the definitions in the Acts of 1945 and 1954, but upon the defini-

[1] [1931] A.C. 446.

tion contained in section 13 of the Act of 1951. This Act provided for the making of grants for re-equipment and modernisation of industrial undertakings. For the purposes of the Act section 13 defines "industrial undertaking" as follows: "In this Act the ex- "pression 'industrial undertaking' means any person or body of "persons whether corporate or unincorporate engaged in Northern "Ireland in the manufacture of goods or the processing of goods "in the course of manufacture, and the expression 'goods' includes "ships or vessels."

It will be seen at once that this definition of "industrial under- "taking" in the Act of 1951 is much narrower than the definitions in the Acts of 1945 and 1954. It only includes the actual manufacture of goods and the processing of goods in the course of manufacture. It does not cover the altering, repairing, cleaning, adapting for sale and so forth included in the definition in the Act of 1945. Nor does it cover "the subjection of goods or materials to any "process" which would qualify an undertaking for a grant under the Act of 1954 by virtue of the definition contained in that Act. The deliberate abandonment in the Act of 1951 of the wide definition contained in the Act of 1945 is striking. One is tempted to think that by the words "manufacture of goods" in the Act of 1951 the Legislature only intended to cover what was included in the phrase "the making of any article or substance or part of any "article or substance" in section 11 of the Act of 1945, and inferentially to exclude the other operations and processes covered by the definition of "industrial undertaking" in that section.

It is agreed that the operations of the appellant company do not fall under the category of the processing of goods in the course of manufacture. The net question for decision accordingly is do these operations constitute the "manufacture of goods" within the definition in section 13.

It is a fundamental principle in construing Acts of Parliament that in the absence of indication to the contrary words and phrases are to be construed in their ordinary and popular sense and as they are used in common parlance. A series of authorities in which this principle has been repeatedly reiterated will be found conveniently collected in the English and Empire Digest, vol. 42, pp. 616-623. Accordingly one asks, would the ordinary plain man describe or regard the operations conducted in the appellant company's premises as the "manufacture" of goods. For my part I do not think that he would. He would, I should think, describe the opera-

tions, complicated as they are, as the cleaning and sorting of seed and the ridding from it of impurities, but I do not think that in the ordinary use of language these operations would be described by him as constituting the "manufacture" of anything. Nor, in my opinion, would the ordinary man describe the ultimate product of the operations, the cleaned and purified seed, as a manufactured product. He would, I feel sure, simply regard it as a product of nature which had been freed from impurities by the processes to which it had been subjected. The point is not one upon which much help is to be gained from legal decisions, or indeed from legal argument. The question simply is whether in ordinary parlance one would describe the processes to which the seed is subjected as the manufacture of goods.

Nor do I think that we can expect much help from dictionaries. It is the function of dictionaries to give in their definitions not only the ordinary and common uses of words, but also rare and unusual uses. From the mere fact that a certain meaning of a word is to be found in a dictionary it does not necessarily follow that the word, when used in an Act of Parliament, can be interpreted so as to include that meaning; for the meaning may be an un usual and artificial one whereas words used in an Act of Parliament must prima facie be construed according to their ordinary popular and natural meanings. However, as adjured in argument, I have consulted a number of standard dictionaries but have found nothing in them to point me to the conclusion that the words "manufacture "of goods" in section 13 should be construed in the very wide, and I venture to think artificial, sense contended for by the appellant company.

The appellant company, however, also relies upon certain phrases used by Scrutton L.J. in his judgments in *Hines v. Eastern Counties Farmers' Co-operative Association Limited*[1], and the other cases associated with it in the same volume of reports. Those cases arose under the Rating and Valuation (Apportionment) Act, 1928, and the question at issue in the cases was whether the various premises with which they were concerned were "industrial hereditaments" within the meaning of that Act. Section 3(1) of the Act defined "industrial hereditament" as a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or (subject to certain specified exceptions) as a factory or workshop, and section 3(2) enacted that "factory" and "work-"shop" had the same meanings as in the Factory and Workshops

[1] [1931] 1 K.B. 446.

Acts, 1901 to 1920. I need not set out at length the definitions of "factory" and "workshop" in those Acts. Suffice it to say that by section 149(1) of the Act of 1901 the definition of "non textile "factory" included any premises in which any manual labour was exercised by way of trade in making any article or adapting any article for sale, and wherein steam water or other mechanical power was used in aid of the manufacturing process carried on there, and the definition of "workshop" included any premises in which any manual labour was exercised by way of trade in making any article or adapting for sale any article, and over which premises the employer had the right of access or control. In *Hines v. Eastern Counties Farmers' Co-operative Association Limited*[1] the seed was subjected to elaborate mechanical operations in order to clean it and free it from impurities apparently similar to the operations described in Mr. Gilbert's affidavit in the present case, but in addition some of the processes had the effect of actually altering the substance of the seeds; oats were clipped of their sharp points; some seeds were decorticated or the husks removed; some hard seeds were broken so that they might germinate. The Court of Appeal held that the processes to which the seeds were subjected constituted an "adaptation for sale" within the meaning of that term in the definitions in section 149(1) of the Act of 1901, and that the premises were accordingly an industrial hereditament under the Act of 1928. This decision was subsequently affirmed by the House of Lords[2]. It will be noticed that it did not become necessary to decide whether the premises were a "factory" or whether they were a "workshop." If the processes constituted an adaptation for sale it followed that the premises were either a factory or a workshop, and whichever category they fell under, they became an "industrial hereditament" within the meaning of that term in the Act of 1928.

The phrases in Scrutton L.J.'s judgment upon which the appellant company relies are phrases in which he speaks of the process of cleaning and sorting the seed by machinery as a manufacturing process. Thus he says[3] that the process of sorting (s.c. the seed) may be so complicated and mechanical as to deserve the title of a manufacturing process, i.e., of "adapting for sale." Then he says[4] that whether sorting operations come within "manufac- "ture" to make the premises a factory or workshop is a question

1 [1931] 1 K.B. 446.
2 [1931] A.C. 446.
3 [1931] 1 K.B. at 494.
4 Ibid. 496.

of degree in each case. And, when dealing with another seed cleaning case (*Pritchard v. William Lewis and Sons*) where the seed cleaning processes were carried on in premises, part of which was a retail shop, he says[1] that on the facts stated, the primary purpose of the hereditament was not a process of sale but a process of manufacture. It is urged that these expressions of Scrutton L.J. show that it is a legitimate and natural use of the English language to speak of the processes carried on in the present case as the "manufacture" of goods.

If I thought that in these judgments Scrutton L.J. was purporting to use the words "manufacture" and "manufacturing process" in their ordinary natural meaning, I should have the greatest hesitation in venturing to differ from a user of the English language by that very great judge. But what Scrutton L.J. was engaged on in the passages which I have quoted was a discussion of the various cases under consideration in the light of the definitions contained in the Factory Acts, and when using the terms "manufacture" and "manufacturing process" he was naturally using them in the special sense in which they were used in the Factory Acts. In those Acts the phrase "manufacturing process" has for a long time been used with a very wide meaning, much wider than it would bear in ordinary usage. Thus in the Factory Act Extension Act, 1867, "manufacturing process" was defined as meaning any manual labour exercised by way of trade or for purposes of gain in or incidental to the making of any article or part of an article or in or incidental to the altering, repairing, ornamenting, finishing or otherwise adapting for sale any article. It is obvious that manual labour might well be exercised in adapting articles for sale (for example in packaging them) in ways which no one would ever dream of describing in ordinary language as "manufacturing processes" but which would have been included in this term under that definition. The Act of 1867 was repealed in 1878, but a similar position existed under the definitions in the Factory and Workshops Act, 1901, which were the definitions to which Scrutton L.J. was addressing himself in the judgments upon which the appellant company relies. Thus in *Owner v. Cottingham*[2] it was held that the words "manufacturing process" as used in section 149 (the definition section) of the Factory and Workshops Act, 1901, did not necessarily refer to something being produced, but to the type of activity carried on in the premises, and that the

[1] Ibid. 504.

[2] (1910) 74 J.P. 219.

operation of a laundry by mechanical power was a "manufacturing "process" within the meaning of that term as used in the definition of "non textile factory" in the Act. So too in *Johnston v. Lalonde Brothers & Parham*[1] it was held that carpet beating by mechanical power was a "manufacturing process" within the definition of "non textile factory" in the Act of 1901. In fact it may be taken that "manufacturing process" was to be regarded for the purposes of the Act simply as any process carried out by mechanical power. In his judgment in *Johnston v. Lalonde Brothers & Parham*[1] Lord Alverstone C.J. does not hesitate to state that the words "manufacturing process" are used in the Act in a somewhat unnatural sense and that it would be impossible to suggest that in ordinary circumstances dry cleaning and carpet beating were manufacturing processes. It was, however, to a definition containing the term used in this wide sense that Scrutton L.J. was directing his attention in the judgments on which the appellant company relies. I venture to think that it would have greatly surprised him to suggest that the phrases cited from his judgment would some time be relied upon in support of the contention that operations such as those carried on in the case now before us constituted a process of manufacture under a statute which in no way incorporated or referred to the Factory Acts, and in which the word "manufacture", according to the ordinary canons of construction, fell to be interpreted according to its usual and popular meaning. I do not leave out of sight the fact that Lord Dunedin also used the term "manufacturing process" when the cases came before the House of Lords[2]. But here again I think Lord Dunedin was using the term as a Factory Acts expression and was not considering whether all the activities with which the cases under appeal were concerned could naturally be described as manufacturing processes in ordinary speech.

It appears to me that any attempt to construe section 13 of the Act of 1951 by reference to the Factory Acts or to the definitions contained in those Acts, or to phrases from those Acts used in judgments in cases decided under those Acts or under Acts incorporating Factory Acts definitions only beclouds the issue. The Factory Acts and the Act of 1951 were enacted for very different objects. The Act of 1951 has nothing to do with the Factory Acts, one of the leading objects of which was to secure the protection of workpeople from dangerous machinery and in which, as I have

[1] [1912] 3 K.B. 218. [2] [1931] A.C. at 485

shown, the phrase "manufacturing process" came to be used as including any industrial process whether manufacturing or not which involved the use of power driven machinery. Section 13 of the Act of 1951 contains an absolutely independent and self sufficient definition of "industrial undertaking" for the purposes of that Act. It makes no reference whatever to the Factory Acts or to the extended and artificial meaning which the phrase "manufac-"turing process" bore in the definition sections of some of those Acts. Our task is simply to construe the phrase "the manufacture "of goods" contained in section 13 of the Act of 1951 according to the ordinary and natural use of the words, and to ask whether the processes described in Mr. Gilbert's affidavit constitute "the "manufacture of goods" in the ordinary acceptation of those words and as they are used in common parlance. In my opinion the answer should be that they do not. Accordingly I think that Curran J.'s decision was correct and that the order made by him should be affirmed.

Appeal allowed.

Solicitors for the appellant company: *L'Estrange & Brett.*
Solicitor for the Ministry: *Chief Crown Solicitor.*

J.P.

IN RE TOWNSEND STREET BELFAST PRESBYTERIAN ENDOWMENT TRUSTS.

DICKEY AND OTHERS v. H.M. ATTORNEY-GENERAL FOR NORTHERN IRELAND AND ANOTHER[1].

Charity—Educational endowment—Scheme for administration made by commissioners under statutory powers and approved by Order in Council—Provision in the scheme for its alteration—Jurisdiction of the court to alter scheme—Charities Procedure Act, 1812 (*"Romilly's Act"*) (52 *Geo.* 3. *c.* 101)—*Educational Endowments (Ireland) Act*, 1885 (48 & 49 *Vict., c.* 78).

The Educational Endowments (Ireland) Act, 1885, empowered commissioners to frame schemes for the management of educational endowments. In framing schemes the commissioners had to have regard to the spirit of the founders' intentions (section 13); a scheme might provide for its alteration from time to time by the Commissioners of Charitable Donations and Bequests for Ireland (section 18); a scheme when approved has full operation and effect as if enacted in the Act (section 27); and the Order in Council approving a scheme is conclusive evidence that the scheme is within the scope of and in conformity with the Act, and the validity of the scheme shall not be questioned in any legal proceedings whatsoever (section 29).

A scheme framed under the Act and approved by Order in Council contained a provision that it might be altered from time to time in any matter whatsoever by the Commissioners of Charitable Donations and Bequests for Ireland. The trustees of the endowments covered by the scheme having decided that it was no longer possible to apply them in accordance with the trusts contained therein applied to the court under the Charities Procedure Act, 1812 ("Romilly's Act"), for an order directing a scheme for the application of the endowments cy-près. Since 1922 the powers of the Commissioners of Charitable Donations and Bequests for Ireland are exercisable as respects Northern Ireland by the Ministry of Finance after consultation with the Ministry of Education.

Held, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.) that the court had no jurisdiction to direct a scheme; by Lord MacDermott L.C.J. on the ground that the Act conferred upon the Commissioners power to frame schemes which would be effective to oust the jurisdiction of the court, and in this case they had framed a scheme containing an express provision for its alteration in a mode which was intended to be exclusive; by Porter L.J. on the ground that the court can direct a scheme under Romilly's Act only where the direction or order of the court is necessary for the administration of a trust, and as the scheme in the present case provided adequate machinery for its alteration it could not be said that the direction or order of the court was "necessary"; by Black L.J. on the ground that section 27 of the Act gave the scheme the same force as if it had been enacted in the Act, and since the terms of the scheme indicated that it was intended to provide fully for the administration of the

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Porter and Black L.JJ.; Nov. 22, 23, 26, 1954; Feb. 18, 1955.

trusts the court was precluded from altering the scheme made under the Act. Decision of Curran J. reversed.

APPEAL from an order of Curran J. on an originating summons taken out by the plaintiffs with the fiat of the Attorney-General under the Charities Procedure Act, 1812.

The endowments for providing and maintaining a series of schools for the education of children in the district surrounding the Townsend Street Presbyterian Church in the City of Belfast were the subject of a scheme dated March 8, 1892, and framed under the Educational Endowments (Ireland) Act, 1885. This scheme vested the endowments comprised in the scheme in a body incorporated under the name of "The Trustees of the Townsend Street, Belfast, "Presbyterian Endowments" therein referred to as "the Board." By reason of the changes in the system of education since 1892 the Board decided that it was no longer possible to apply the endowments in accordance with the trusts contained in the scheme and accordingly the plaintiffs, three members of the Board on behalf of the Board, applied to the court by summons under the Charities Procedure Act, 1812, ("Romilly's Act"), for an order directing the preparation of a scheme for the administration of the trusts cy-près. The application came before Curran J. who directed that the Ministry of Finance for Northern Ireland should be joined as defendant in its capacity as the authority exercising the functions formerly vested in the Commissioners for Charitable Donations and Bequests for Ireland. Subsequently Curran J. made an order directing a scheme to be prepared, and from this order the Ministry of Finance appealed, contending that the court had no power to make an order.

The facts are fully set out in the judgment of Lord MacDermott L.C.J.

Harrison Q.C. and *Gibson* for the Ministry.
Lowry for H.M. Attorney-General for Northern Ireland.
MacDermott for the Board.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: Over a century ago the congregation of Townsend Street Presbyterian Church in the City of Belfast, under the vigorous leadership of its minister, the Reverend William Johnston, entered upon the project of providing and maintaining a series of schools for the secular and religious education of the

children of the district surrounding the congregation's church. By 1880 the accommodation thus provided consisted of four schools, namely, the Townsend Street School, the Conway Street School, the Blenheim Street School and the Northumberland Street School. These schools were carried on as national schools in connection with the Commissioners of National Education. They were maintained by the congregation and managed by its minister for the time being.

By a scheme dated March 8, 1892, and framed under the Educational Endowments (Ireland) Act, 1885, the trusts respecting the said schools and other property in which the congregation had an interest were settled and determined. This instrument, which I shall refer to as "the scheme", vested the school endowments, that is to say, the schools and all other property then or thereafter to be held in trust for their purposes in a body thereby incorporated under the name of "The Trustees of the Townsend Street, Belfast, "Presbyterian Endowments" and therein and hereinafter referred to as "the Board." Clause 6 of the scheme provided for the future trusts of the school endowments as follows:

> "6. From and after the date of this Scheme, and subject to "the conditions and provisions herein contained, the School "Endowments, and all the rents, profits, and income thereof, "shall be held and received by the Board upon trust to maintain, "in the buildings hitherto occupied by the Townsend Street "Schools, Northumberland Street Schools, Blenheim Street "Schools, and Conway Street Schools, respectively, or in such "other buildings as the Board may acquire as hereinafter pro- "vided, day schools for the elementary education of such children "as shall resort thereto, in the manner and subject to the con- "ditions and provisions herein prescribed."

The scheme also contains clauses regulating the application of the school endowments to the purposes of the schools and providing for their management and for various other matters which, with the exception of certain provisions that I shall mention later, are not now material.

Since the scheme was framed far-reaching changes have taken place in the educational system of the country and elementary education in particular has come more and more to be regarded as a function of the State. In consequence of these changes and the passing of the Northern Ireland Education Acts of 1923 and

1947, three of the schools referred to in the scheme have ceased to be used or needed as such and one has ceased to be carried on by the Board. The Conway Street School ceased to be used in 1925 and was sold for £100. About a year later the Townsend Street School was united with another school and the church lecture hall in which it had been carried on has since been used for congregational purposes and youth work. The Blenheim Street School was transferred to the Belfast Education Authority in 1929 under powers conferred by the Education Act of 1923, and the Board have ceased to be responsible for its management. The Northumberland Street School was also transferred to the Belfast Education Authority, but its buildings were damaged in air-raids during the war and it was subsequently returned to the Board who have now sold it and invested the proceeds of sale in £4,825 2s. 8d. 2½ per cent. Consols.

In the circumstances which I have outlined the Board feel that it is no longer possible to apply the school endowments for the purposes and in the manner set out in the educational trusts declared by the scheme. This view is not challenged and must be accepted as correctly indicating the present state of affairs.

On June 23, 1954, the plaintiffs, on behalf of the Board of which they themselves are members, issued an originating summons with the fiat of the Attorney-General under the Charities Procedure Act, 1812 (hereinafter referred to as "Romilly's Act"), asking, inter alia, whether the school endowments held by them under the scheme were held subject to valid charitable trusts, and, if so, that a scheme for the administration of the said trusts should be settled by the court. On July 19, 1954, Curran J. added the Ministry of Finance for Northern Ireland (hereinafter called "the Ministry") as a defendant and adjourned the summons into court. He then answered the question as to whether the school endowments were held subject to valid charitable trusts in the affirmative, and directed the plaintiffs to prepare a scheme in respect of the said trusts for the approval of the Attorney-General and, when that approval had been obtained, to bring the same back for the approval of the court.

From that order the present appeal is brought by the Ministry in order to obtain a ruling as to whether Curran J. had jurisdiction to order the preparation of a scheme. His finding that the Educational Endowments now held by the Board are subject to valid charitable trusts is, I need hardly add, not disputed.

In directing a scheme Curran J. was following the course taken by Megaw J. in a series of somewhat similar applications which came before him during the period 1933 to 1938. These, I believe, were all cases in which charitable trusts declared by schemes framed under the Act of 1885 had become incapable of performance, and in which the schemes so framed made provision for their future alteration by the Commissioners of Charitable Donations and Bequests for Ireland. Unfortunately, none of these cases is reported, but my recollection is that the view taken by Megaw J. in each of them was that the whole foundation or substratum of the scheme had disappeared, that the provisions for future alteration therein contained were not intended to meet a situation that went as far as that, and that the jurisdiction of the court to provide for the future administration of the charitable trusts concerned remained unabated. No appeal was taken in any of these cases with the result that this court has now to decide on the validity of a procedure which has stood unchallenged for more than twenty years.

Before considering the scheme and its effects on the jurisdiction invoked by the plaintiffs it will be convenient to refer briefly to the nature of that jurisdiction and then to mention certain provisions of the Act of 1885 which have a bearing on the matter in hand.

The jurisdiction of the former Court of Chancery and now of the High Court of Justice in Northern Ireland respecting charitable trusts is an inherent jurisdiction, the salient characteristic of which is that it extends beyond that pertaining to ordinary trusts so as to provide for the reformation or administration of trusts founded with a general charitable intention where such steps are necessary to give continuing effect to the paramount intention of the founder. Romilly's Act did not curtail this inherent jurisdiction. It is a procedural enactment which by section 1 provides a summary remedy "in every case of a breach of any trust or sup-"posed breach of any trust created for charitable purposes, or when-"ever the direction or order of a court of equity shall be deemed "necessary for the administration of any trust for charitable pur-"poses...."

Had the trusts with which we are now concerned arisen directly by the declaration of those who founded the endowments in question the competence of the court to intervene and direct a scheme, as Curran J. has done, would, in the circumstances, be clear having

regard to the nature of the jurisdiction just described. This is not in dispute. What is said is that that jurisdiction has been ousted by the scheme.

The broad purpose of the Act of 1885 was to reorganise the Educational Endowments of Ireland. It set about this by establishing a commission of five members with wide powers of drafting schemes for the future government and management of educational endowments which would supersede all existing trusts and conditions. It is unnecessary to go through this statute section by section, but reference must be made to the following provisions. Section 13 enacts, inter alia, that it shall be the duty of the Commissioners in framing schemes "to have regard to the spirit of "founders intentions." Section 18 provides for the future alteration of schemes in the following terms:

> "18. In any scheme the Commissioners may provide for the "alteration of the scheme from time to time by the Commis- "sioners of Charitable Donations and Bequests for Ireland upon "application made by the governing body or any party inter- "ested, provided such alteration shall not be contrary to any- "thing contained in this Act."

Apart from section 28, which I shall refer to in a moment, this appears to be the only provision in the Act for the alteration of schemes made thereunder. Sections 19 to 32 deal with the procedure to be followed in the preparation and perfecting of schemes. The final requirement is approval by the Lord Lieutenant by Order in Council. Then the third paragraph of section 27 provides as follows:

> "A scheme, when approved by the Lord Lieutenant in Council, "shall have full operation and effect from the date of such Order "in Council, in the same manner as if it had been enacted in "this Act; and thereupon every Act of Parliament, letters patent, "statute, deed, instrument, trust, or direction relating to the "subject matter of the scheme, so far as inconsistent with the "provisions thereof, shall be repealed and abrogated."

Section 28 enacts that schemes may be framed and approved for amending any scheme approved under the Act and that all the provisions thereof relating to an original scheme shall apply, mutatis mutandis, to an amending scheme. In my opinion this provision was clearly intended to confer a power of amendment upon the Commission established by the Act and cannot be re-

sorted to now that the powers of the Commission are spent. Then, section 29 enacts:

"The Order in Council approving a scheme shall be conclusive "evidence that such scheme was within the scope of and made "in conformity with this Act, and the validity of such scheme "and Order shall not be questioned in any legal proceedings "whatever."

Section 37 should also be noted. It provides that "if the governing "body of any educational endowment fail to give effect to the "provisions of any scheme approved under this Act" the Lord Lieutenant or the Commissioners of Charitable Donations and Bequests for Ireland, upon the application of certain specified interested parties, may require the governing body to give effect to the provisions of the scheme, and that if they fail in this they may be compelled to do so by the High Court on the application of the Attorney-General. And, lastly, section 38 provides that the powers of making schemes under the Act shall not be exercised after December 31, 1888, unless the time be extended in the manner thereby provided. In point of fact, there was such an extension but it expired in 1897. That being so, the only provision of the Act from which power to alter schemes made thereunder may now be derived is that contained in section 18.

As I have observed, the Act conferred wide powers upon its Commissioners and I have no doubt that these were such as to enable the Commissioners to frame schemes which by their terms would be effectual to oust the jurisdiction of the court. Apart from any question as to how far schemes under the Act are to be regarded as having the quality and effect of Acts of Parliament, section 29 makes it impossible to challenge the validity of a duly approved scheme, and, accordingly, if in any such scheme the Commissioners have, for example, chosen to say, either expressly or by necessary implication, that the only alteration which may be made thereto in the future is to be made by the Commissioners of Charitable Donations and Bequests, then it seems to me necessarily to follow that the jurisdiction of the court has been effectually ousted.

It will therefore be appropriate to consider next whether the terms of the Scheme of 1892 have this effect. I have already indicated the general purport of this scheme and I must now amplify this by a reference to two of its provisions. The first of these occurs after the recitals and before the numbered clauses. It reads thus:

"Therefore, from and after the date of this Scheme, being "the day upon which the Lord Lieutenant shall by Order in "Council declare his approbation thereof, the said several Endow- "ments shall be held, governed, managed, and applied for the "purposes, with the powers, under the conditions and provisions, "and in the manner hereinafter set forth, and not otherwise, any "previous Act of Parliament, Letters Patent, Statute, Charter, "Scheme, Deed, Will, Codicil, Instrument, Trust, Order or "Direction, relating to the subject matter of this Scheme, to the "contrary notwithstanding."

The second provision is contained in clause 43 of the Scheme which, omitting what does not apply to the Educational Endowments, reads:

"43. This Scheme may be altered from time to time by the "Commissioners of Charitable Donations and Bequests for Ire- "land, in any matter whatsoever, upon the application of the "Board with the sanction of the General Assembly,....but except "upon such application, no alteration shall be so made, and no "alteration shall be made contrary to anything contained in the "Act; provided also that the Board....shall not be deemed to "have made such application unless the resolution authorising "the making thereof shall specify the nature of the alteration "required, and shall have been passed at two successive meetings "of the Board....specially convened for the purpose."

I must at this point digress for a moment to refer to the standing of the Ministry in these proceedings. The Commissioners of Charitable Donations and Bequests for Ireland ceased to function in this jurisdiction after Northern Ireland had been established as a separate entity under the Government of Ireland Act, 1920. It is sometimes said that the Ministry is the successor in Northern Ireland of this body, which I shall call for short "the Charity Com- "missioners." That, I think, is rather a loose and inaccurate way of stating the position, though no doubt the Ministry is the department responsible for the administration in Northern Ireland of the Irish service formerly administered by the Charity Commissioners. I need not, however, pause to determine the precise extent to which the Ministry has been clothed with their functions, powers and duties as counsel both for the plaintiffs and the Attorney-General were agreed that the powers of the Charity Commissioners arising from the exercise of the powers contained in section 18 of the Act of 1885 were now exercisable as respects Northern Ireland

by the Ministry after consultation with the Ministry of Education for Northern Ireland. That is the effect of article 6 of the Government of Ireland (Educational Enactments, &c.) Order, 1922 (S.R. & O. 1922 No. 352), which was made as an adaptation order under section 69 of the Act of 1920.

Returning to clause 43 of the scheme I must say that if this provision had to be reviewed in isolation and without regard to other considerations I would be in grave doubt as to whether it sufficed to oust the jurisdiction of the court. It is permissive in its language and its scope is circumscribed. It says that the scheme *may* be altered from time to time by the Charity Commissioners, and that this power is only exercisable upon an application made by the Board with the sanction of the General Assembly. The clause, therefore, does not provide for alterations made by the Charity Commissioners of their own motion or at the instance of the Attorney-General or some interested party other than the Board, and it can be rendered completely inoperative if the General Assembly refuses to sanction the Board's application.

It was also observed that clause 43 contains no provision for dealing either with a failure on the part of the Board to give effect to the provisions of the scheme or with some more active breach of trust. But in my opinion this omission is not of any significance in the present case. There was no suggestion in the course of the argument that the court's powers under Romilly's Act to deal with an actual or supposed breach of trust had been abrogated, and section 37 of the Act makes provision for compelling the Board to give effect to the scheme.

There are, however, two provisions of the scheme which must, in my opinion, be read with clause 43 in order to reach a conclusion on the question under discussion. As that clause provides, the Charity Commissioners, once they were in a position to act thereunder, could alter the scheme "in any matter whatsoever" provided no alteration was made contrary to anything contained in the Act. The Charity Commissioners were therefore bound, in my opinion, to heed the requirement of section 13 of the Act, which I have already mentioned, and to have regard "to the spirit "of founders intentions." The jurisdiction of the court to formulate a scheme would, on the other hand, be subject to a different restriction. Any scheme approved by the court would have to be cy-près the founders' intentions. There is an important distinction

between these requirements and there can be no doubt that the duty to act cy-près may be much more limiting than the duty to have regard to the spirit of founders' intentions. Accordingly, if the scheme does not affect the jurisdiction of the court an anomalous situation might well arise in which the Charity Commissioners would be entitled to take one course under clause 43 and the court would have to take a different course. Again, the introductory provisions of the scheme, which I have already quoted, are important as showing its intended scope and purpose. Under this part of the scheme the educational endowments are to be applied "for the purposes, with the powers, under the conditions and pro-"visions, and in the manner hereinafter set forth, and not other-"wise." Now, if one could restrict the application of those words to clause 6, which declares the trusts of the school endowments, it might be argued that they only applied to a situation in which the trusts could be performed and carried into effect. But I do not think the words I have quoted can be restricted in this way. They refer to the conditions and provisions of the scheme including, amongst others, those of clause 43, and it therefore seems to me that what this part of the scheme is saying is that the educational endowments are to be managed and applied in the manner set forth or, if that has to be altered, then in the manner set forth in the scheme when altered in accordance with its provisions, and not otherwise.

These considerations lead me to the conclusion that the provisions of clause 43 as respects future alterations of the scheme were meant to be exclusive, the underlying intention of the scheme being that the future application and management of the endowments concerned should, whatever the event, be regulated without resort to any jurisdiction or authority not provided for by the original scheme or any competent alteration thereof. Before passing from this subject I should say that the word "altered" as it appears in clause 43 was debated at some length before us. In different contexts the words "alter", "amend" and "modify" may have different shades of meaning, but I am unable to find anything in the relevant text to support the view that "altered" is here used as a word of narrow meaning which should be confined to matters of detail.

The conclusion I have stated suffices to dispose of the appeal, but there is another aspect of the argument which I think I should mention in order to preclude misunderstanding. On behalf of the Ministry it was submitted that this conclusion also followed for

another reason, namely, that the scheme had by virtue of section 27 of the Act the full force and effect of an Act of Parliament. Now, I am inclined to think that the primary purpose of the part of section 27 which was relied upon, and which I have already quoted, may have been to launch schemes framed under the Act clear of all entanglements that might arise from existing enactments and instruments. The concluding part of the section suggests a limited purpose of this kind, and it may be said that the validating provisions of section 29 would not have been necessary if section 27 had the effect of making a scheme framed under the Act the same as an Act of Parliament to all intents and purposes. The words "shall have full operation and effect. . . .in the same manner as "if it had been enacted in this Act" are, however, comprehensive and clear in their meaning and I do not forget that in *In re Berkhamsted Grammar School*[1], Warrington J. regarded a scheme under the Endowed Schools Act, 1869, to be by virtue of the same words in section 45 thereof "as much an Act of Parliament as if it had "been enacted by that Act," or that this view was followed in relation to another similar provision by Roxburgh J. in the recent case of *London Parochial Charities Trustees v. Attorney-General*[2]. I am therefore content to proceed on the assumption that, for the purposes of this branch of the case, the scheme is to be treated as though it were part of an Act of Parliament. So to treat it emphasises, if anything, the conclusion I have already expressed. But the argument of the Ministry on this aspect of the matter rested, as I understood it, on a different basis, being founded on the propositions—(i) that the court had no jurisdiction to alter the terms of a statute and (ii) that, accordingly, as the scheme stated the objects of its educational trusts plainly, the court was not competent to modify those objects and could not, therefore, direct or approve a scheme for that purpose. The first of these propositions goes without saying, but its application to the circumstances of the present case raises a point of some difficulty. Does it apply so as to preclude the court from establishing new objects when the old objects have come to an end and the Act of Parliament (or its equivalent) does not provide for that event? An example may serve to point this question. By statute Blackacre is vested in trustees to hold in fee upon trust to use the same as a place of physical training for the pupils of an adjoining charitable scholastic foundation. That is all. The foundation comes to an end and the statutory

[1] [1908] 2 Ch. 25.

[2] [1955] 1 W.L.R. 42.

trusts of Blackacre are rendered impossible of performance. Can the court settle a scheme? The Ministry's argument, if well founded, would, I think, answer that question in the negative on the ground that if Parliament says Blackacre is to be held in perpetuity on trust for a particular purpose only Parliament can substitute another purpose. The opposing view seems to be that in such case Parliament, having only provided for the charitable user of Blackacre while the adjoining foundation functions, has not dealt with the administration of the trusts thereafter and, accordingly, that the court has jurisdiction to do what Parliament has left undone, namely, to settle new trusts so that Blackacre may continue to be applied to charitable purposes notwithstanding the failure of the original trusts.

This sort of situation appears to fall within one or other of two sentences in Tudor on Charities, 5th ed., at p. 179, both of which are founded on *In re Shrewsbury Grammar School*[1]. The first reads:

> "The Court has no authority to establish or prescribe the mode "of administration of a charity completely regulated by an Act "of Parliament, for it cannot alter the provisions of a statute."

And the second runs thus:

> "Where the statute does not completely regulate the charity "there is nothing to oust the jurisdiction of the Court in respect "of matters not dealt with by the statute."

Which of these excerpts applies to the question I have posed? Neither gives a clear answer, though it would seem to me that to hold that the jurisdiction of the court had not been ousted in the case of the trusts of Blackacre would not be in conflict with anything said by Lord Cottenham in the *Shrewsbury Grammar School* case[1] and would find some support in what was done by Sir William Page Wood in the earlier *Berkhamsted School* case[2].

I do not express any concluded opinion on this border-land problem as it is unnecessary for me to do so. I have, however, referred to the matter because the questions raised in the present appeal appear somewhat intertwined and I wish to guard against being thought to have decided a point which I prefer to leave until it demands an answer.

For the reasons stated I would allow the appeal and substitute for the direction given by Curran J. in response to paragraph (2) of the originating summons the words "The court has no juris-

[1] (1849) 1 Mac. & G. 324. [2] (1865) L.R. 1 Eq. 102.

"diction to direct such a scheme." Having regard to the terms of clause 43 we cannot refer the preparation of a scheme to the Ministry and must leave it to the Board to make such application under that clause as they may be advised. On the question of costs it would, in the circumstances, be wrong if the trust funds had to bear these even in part. I think this was recognised by counsel for the Ministry and my view is that the costs here and in the court below of all parties other than the Ministry should be taxed as between solicitor and client and paid by the Ministry.

PORTER L.J.: This is an appeal by the Ministry of Finance for Northern Ireland from an order of Curran J. made on an originating summons under Romilly's Act whereby the trustees of the Townsend Street Belfast Educational Endowments were directed to prepare a scheme in respect of the trusts set forth in the scheme dated December 22, 1891, and made under the Educational Endowments (Ireland) Act, 1885.

Owing to the great change which has taken place in the last sixty years in that part of the city in [illegible]n the four schools were situated and to the passing of the Northern Ireland Education Acts, it is clear that the endowments cannot be applied towards the specific objects and purposes set forth in the scheme. Alteration of the scheme is therefore necessary, and there is provision for such alteration in clause 43 of the scheme. This clause was included in the Scheme by virtue of section 18 of the Educational Endowments (Ireland) Act, 1885, which is as follows: "In any scheme "the Commissioners may provide for the alteration of the scheme "from time to time by the Commissioners for Charitable Dona- "tions and Bequests for Ireland upon application made by the "governing body or any party interested, provided such alteration "shall not be contrary to anything contained in this Act."

Substituting the Ministry of Finance for Northern Ireland for the Commissioners of Charitable Donations and Bequests for Ireland, clause 43 is as follows:

"This Scheme may be altered from time to time by the Minis- "try of Finance for Northern Ireland, in any matter whatsoever, "upon the application of the Board with the sanction of the "General Assembly, or in any matter relating to the Henry "Louden Charity, upon the application of the Board with the "sanction of the Louden Committee, or in any matter relating "to the Henry Martin Johnston Charity with the sanction of the

"Johnston Committee, but except upon such application no "alteration shall be so made, and no alteration shall be made "contrary to anything contained in the Act; provided also that "the Board and the said Committee respectively shall not be "deemed to have made such application unless the resolution "authorising the making thereof shall specify the nature of the "alteration required, and shall have been passed at two con- "secutive meetings of the Board or Committee as the case may "be specially convened for the purpose."

Counsel for the Ministry contended that the power to alter conferred by the clause was an exclusive power which ousted the jurisdiction of the court to direct a scheme. He said that the scheme as authorised by the Act makes the most specific and detailed provision for its own alteration, and that the charity is completely regulated by the scheme, which by section 27 of the Act is declared to have full operation and effect in the same manner as if it had been enacted in the Act. Therefore, he argued, it was unnecessary to involve the assistance of the court for the preparation of a scheme.

We were referred to the judgment of Lord Cottenham in *In re Shrewsbury Grammar School*[1]. That was a case in which trustees of a charity were possessed of funds for the application of which there were no specific directions and it appeared that the funds could not be advantageously applied in the execution of the existing trusts. With reference to the petition brought under Romilly's Act by the trustees he said[2]: "The question comes to this, is this "or not a case in which the assistance of the Court *is required* in "the administration of the charity funds?....The trustees say that "they have funds which they admit to be charitable funds, and that "they do not know precisely the mode in which they ought to be "applied. If that were all, and *there were no particular Act of Parlia- "ment affecting the trust*, it would be the ordinary case in which "since the passing of Sir Samuel Romilly's very useful Act parties "come to ask the direction of this Court what they are to do with "funds, with respect to which there are either no specific directions "as to the trusts to be executed, or which for some reason or other "cannot be properly and advantageously applied in the execution "of those trusts."

Applying this test to the present case, we have a statutory scheme and a clause in that scheme making complete provision for an

[1] (1849) 1 Mac. & G. 324. [2] Ibid. 331.

alteration of the scheme "in any matter whatsoever," so that the assistance of the court is not required for the alteration of the scheme. This principle was followed by Roxburgh J. in the recently reported case *London Parochial Charities Trustees v. Attorney-General*[1]. In *In re Berkhamsted Grammar School*[2], a petition was presented praying that an amended scheme for the regulation and management of the school might be rescinded altered or amended in the manner suggested in the petition. The scheme was made by the English Board of Education under the Endowed Schools Acts of 1869, 1873 and 1874, and sections 44 and 45 of the 1869 Act relating to the validity of the original and the amended scheme contain words similar to the words in sections 28 and 29 of the 1885 Act, so that the scheme whether original or amended, when it has been duly made and approved, has "full operation and effect in the "same manner as if it had been enacted in this Act."

One of the main objections to the amended scheme was that the Board had no power to alter the scheme. It was said that the Board could not alter the statute; therefore they could not alter the scheme which must be treated as if it were a part of the statute.

Dealing with this contention Warrington J. said [3]: "The answer "to the argument is that the power to alter is part of the statute "of which the scheme of 1877 is itself a part, or rather is to be "treated as a part—to be treated as if it had been enacted in the "statute. It is exactly the same as if the scheme of 1877 had been "originally a statute and that statute had provided that the Board "may from time to time frame schemes altering this scheme."

Now since the power to alter is to be treated as if it had been enacted in the statute, it is equally clear from the terms of sections 27 and 28 of the 1885 Act that it was in the contemplation of the Legislature that the amended scheme when duly made and approved should have full operation and effect in the same manner as if it had been enacted in the Act. An amended scheme could, of course, be given statutory authority by an Act of Parliament, but there is no other method by which this could be done except by following the procedure prescribed by clause 43 of the scheme.

The opening words of the clause—"This Scheme may be altered" —are of course permissive, because the Ministry is bound to exercise its discretion in framing an amended scheme, but when one

[1] [1955] 1 All E.R. 1.
[2] [1908] 2 Ch. 25.
[3] Ibid. 44.

considers the clause as a whole, the natural inference is that it was intended to give to the various parties—the Committees, the Board, the General Assembly, and I would add the Ministry—directions as to the proper procedure to be followed in order that the amended scheme might have the same statutory validity as the original scheme.

It was, however, argued by counsel for the Attorney-General and counsel for the plaintiffs that there was nothing in the Act or the scheme, expressly or by necessary implication, to oust the jurisdiction of the court to direct a scheme under Romilly's Act.

Romilly's Act enabled summary proceedings to be taken by way of petition (now by originating summons) in every case of breach or supposed breach of any charitable trust, and whenever the direction or order of the court is deemed *necessary* for the administration of any charitable trust.

Even if it be granted that the jurisdiction of the court is not ousted expressly or by necessary implication by the Act of the scheme, no reason has been or can be given why it is *necessary* to invoke the assistance of the court under Romilly's Act. There is no reason why the Committee and the Board and the General Assembly cannot and should not follow the prescribed procedure. Counsel for the Ministry have stated that the Ministry is willing to carry out its duties in framing an amended scheme, but this can only be done upon the application of the Board with the sanction of the General Assembly, and subject to the other conditions prescribed by clause 43.

I would not say that the jurisdiction of the court is ousted in every conceivable change of circumstances, since it is not difficult to imagine conditions which would necessitate an application under Romilly's Act, but as matters stand the court, in my opinion, has no jurisdiction to direct the preparation of an amended scheme.

BLACK L.J.: By a scheme framed in pursuance of the provisions of the Educational Endowments (Ireland) Act, 1885, (to which I shall refer as "the Act of 1885"), and approved on May 24, 1892, by Order in Council as directed by Section 27 of the Act, provision was made for the future government and management of certain endowments of Townsend Street Presbyterian Church including in particular four national schools conducted in connection with the Church. So far as these schools were concerned the trusts set out in the scheme clearly contemplated the continuance of the operation of the schools in connection with the Church

and did not provide either for a state of affairs when the school buildings could no longer be used as schools or for the trusts of the sale moneys of the schools if they had to be sold. As the result of the changes which have taken place since the passing of the Education Act (Northern Ireland), 1923, one of the four school buildings has been transferred to the Belfast Education Authority. Another of the buildings has ceased to be used as a school and is now used by the Church for other congregational purposes, while the other two buildings have been sold and the trustees of the scheme have in hand investments amounting in value to over £3,000, representing the proceeds of sale of the schools. In view of the fact that the scheme contains no provision for the application of these funds in the events which have happened, the trustees of the scheme brought the matter before the court on originating summons asking whether the school endowments under the scheme were held on valid charitable trusts and, if so, that the court might direct a scheme, if necessary cy-près, for the administration of the trusts. By order dated July 19, 1954, Curran J. having held that the endowments were held subject to valid charitable trusts directed a Scheme to be prepared for the approval of the court for the administration of the trusts. From this order the Ministry of Finance have brought the present appeal contending that the only power to alter the existing scheme is vested in that Ministry and that the court has no power to direct a cy-près application of the funds in the hands of the trustees.

By section 27 of the Act of 1885 it is enacted that: "A scheme, "when approved by the Lord Lieutenant in Council, shall have "full operation and effect from the date of such Order in Council, "in the same manner as if it had been enacted in this Act." What is the effect of a provision such as this in an Act of Parliament? The leading authority on the matter is *Institute of Patent Agents v. Lockwood*[1]. The statutory provision which fell for consideration in that case was section 101(3) of the Patents, Designs and Trade Marks Act, 1883, which enacted that rules made by the Board of Trade under that section should be of the same effect as if they were contained in the Act and should be judicially noticed. In that case Lord Herschell L.C. said[2]: "I own I feel very great difficulty in "giving to this provision, that they 'shall be of the same effect as " 'if they were contained in this Act', any other meaning than this, "that you shall for all purposes of construction or obligation or

[1] [1894] A.C. 347.

[2] Ibid. 360.

"otherwise treat them exactly as if they were in the Act." The same view is expressed by Lord Watson who, after quoting these words from Section 101, proceeds[1]: "My Lords, in regard to those "words which I have just read, I do not think I can express my "opinion more clearly than by saying that I think they mean "exactly what they say. Such rules are to be as effectual as if they "were part of the statute itself."

I am aware that in view of the grounds upon which the House of Lords held the proceedings in *Lockwood's* case[2] to be incompetent these dicta of Lord Herschell and Lord Watson may in strictness be regarded as obiter; and I am also aware that *Lockwood's* case[2] has been discussed and distinguished in subsequent cases such as the Irish cases of *R.* (*Conyngham*) *v. Pharmaceutical Society of Ireland*[3] and *Waterford Corporation v. Murphy*[4] and the case in the House of Lords of *Minister of Health v. The King* (*on the prosecution of Yaffe*)[5]. But so far as I am aware the soundness of Lord Herschell's and Lord Watson's dicta has never been questioned at any rate in regard to cases such as the present where no question arises as to whether the rules or the scheme framed in pursuance of the statutory power are inconsistent with the provisions of the statute or are ultra vires. Accordingly I am of opinion that in the present case the wording of section 27 of the Act of 1885 gives the scheme the status and effect of a statute so that it can only be altered or modified in the way in which a statute can be altered or modified namely by an amending statute or by enabling provisions contained in a statute. This accords with the view taken by Roxburgh J. in the recent case of *London Parochial Charities Trustees v. Attorney-General*[6], in which he held that no jurisdiction existed in the court to modify a scheme for the administration of a charitable trust made in pursuance of powers contained in a statute which gave the scheme statutory force and effect by virtue of a section indistinguishable in its wording from the relevant part of section 27 of the Act of 1885.

At one stage of the present appeal it was sought to be argued that the jurisdiction of the court to direct a cy-près application of the funds and investments was not excluded after the possibility of administering the trusts as set out in the scheme had become impossible, on the ground apparently that the framers of the scheme had left a gap in regard to what was to happen when the time

1 [1894] A.C. at 365.
2 [1894] A.C. 347.
3 [1899] 2 I.R. 132.
4 [1920] 2 I.R. 165.
5 [1931] A.C. 494.
6 [1955] 1 All E.R. 1,

came that the trusts set out in the scheme could no longer be operated. I confess that I found difficulty in appreciating this argument as it was obviously the intention of the scheme to provide fully for the administration of the trusts and not to leave any gap This is made quite clear by the introductory words of the scheme: "Therefore, from and after the date of this Scheme,....the said "several Endowments shall be held, governed, managed, and "applied for the purposes, with the powers, under the conditions "and provisions, and in the manner hereinafter set forth, *and not* "*otherwise*." These last three words have statutory effect by virtue of section 27 of the Act of 1885 equally with the rest of the scheme, and in my opinion effectually preclude any alteration or modification of the terms of the scheme by the court under its inherent jurisdiction to direct the cy-près application of funds held upon charitable trusts.

I am, therefore, clearly of opinion that no power to amend the scheme is vested in the court and that the order appealed from should be reversed. This, however, does not make an alteration or modification of the scheme impossible without recourse to Parliament for an amending Act. Section 18 of the Act of 1885 provided that in any scheme the Commissioners appointed under that Act might provide for the alteration of the scheme from time to time by the Commissioners of Charitable Donations and Bequests for Ireland upon application made by the governing body or any party interested, provided such alteration should not be contrary to anything contained in the Act. Accordingly in pursuance of this power provision was made in clause 43 of the Scheme which is the subject matter of the present proceedings that the scheme might be altered from time to time by the Commissioners of Charitable Donations and Bequests for Ireland upon the application of the trustees with the sanction of the General Assembly of the Presbyterian Church in Ireland. By clause 6 of the Government of Ireland (Educational Endowments, etc.) Order, 1922 (S.R. & O., 1922, No. 352), it was provided that where any scheme framed under the Act of 1885 contains in pursuance of section 18 of that Act provisions for the alteration of the scheme from time to time by the Commissioners of Charitable Donations and Bequests for Ireland the scheme may, in so far as it relates to matters with respect to which the Parliament of Northern Ireland has power to make laws, be altered by the Ministry of Finance after consultation with the Ministry of Education. The Townsend Street scheme

may, therefore, now be altered by the Ministry of Finance after consultation with the Ministry of Education upon the application of the trustees with the sanction of the General Assembly as prescribed by clause 43 of the Scheme, and in my opinion this is the only way, as the law now stands, in which the scheme may be modified or altered otherwise than by an amending Act of Parliament.

Solicitor for the Ministry of Finance: *F. C. MacNeice.*
Solicitor for H.M. Attorney-General: *Malcolm B. Davison.*
Solicitors for the Board: *C. & J. Black.*

J.P.

McLAUGHLIN v. McLAUGHLIN[1]

Divorce—Desertion—Constructive Desertion—Conduct evidencing an intention to drive spouse away—Absence of desire that spouse should leave.

In cases of constructive desertion the petitioner must prove more than reasonable excuse for leaving the matrimonial home: the court must be satisfied that the respondent intended to bring the consortium to an end, and evidence of such intention may consist of conduct by the respondent which he knew or ought to have known would drive the petitioner away. A respondent's conduct may be evidence of an intention to drive the petitioner away notwithstanding a desire that the petitioner should remain in the matrimonial home.

A husband who was normally reasonable and considerate was given to excessive drinking under the influence of which he became temporarily quarrelsome and ill-tempered, though his conduct on such occasions did not amount to cruelty. The wife left the matrimonial home after an incident when the husband, under the influence of drink, abused the wife and pushed her into the street.

Held, (i) that the husband's conduct on the occasion of the separation did not amount to cruelty though it did excuse the wife's withdrawal from the matrimonial home and would have afforded her a defence in any proceedings on the ground of her desertion.

(ii) that the husband's conduct was not so flagrant or persistent as to show an intention to drive the wife away at variance with his desire that consortium should continue.

Principles laid down in *Lang v. Lang* [1955] A.C. 402 applied.
Hull v. Hull (1945) 12 Ir. Jur. R. 59 reconsidered.

Petition by a wife for divorce on the ground of desertion.

The following statement of facts is substantially taken from the judgment of the Lord Chief Justice.

The petitioner and respondent were married on August 3, 1935. It was a mixed marriage, the petitioner being a Protestant and the respondent a Roman Catholic. There were three children of the marriage, two of whom survived. Shortly after the outbreak of war the respondent joined the army. At that time the parties had accommodation in a house in Sheriff Street, Belfast, but while the respondent was in the army the petitioner lived in Dufferin Street, where her mother had a house. During this period she acquired another house in Sheriff Street against her husband's return, and this she furnished and let. On demobilisation they obtained possession of this house—No. 38 Sheriff Street—and resumed cohabitation there. According to the petitioner she arranged this move because Dufferin Street was a Protestant locality and her

[1] In the Queen's Bench Division (Matrimonial) before Lord MacDermott L.C.J.; June 8, July 15, 1955.

husband preferred to be amongst his own co-religionists in Sheriff Street. The respondent did not accept this explanation, but the judge found that the new house was taken for his sake and in the hope that he would find it easier to settle down if he lived there.

In 1946, within a year of the respondent's demobilisation, the parties separated, the petitioner going to her mother's in Dufferin Street and the respondent continuing to reside at 38 Sheriff Street. For a period of some months after this both boys continued to sleep with their father in the Sheriff Street house and to spend the day at school and with their mother, or, when she was at work, with her mother in Dufferin Street. Then the elder boy came to live with the petitioner and the younger boy continued to live in Sheriff Street with his father.

The separation leading to these proceedings occurred on Easter Monday, April 22, 1946. The petitioner and her mother had spent part of the day on a visit to Dundonald Cemetery, the petitioner returning to 38 Sheriff Street in the late afternoon. The elder boy, who had also been out, returned with a bow and arrows he had made. Then the respondent came home, very drunk, and proceeded to fire arrows from his son's bow at the eggs which had been placed upon the table for the family's evening meal. This led to some commotion, but the respondent soon fell asleep and the trouble subsided until about 8 p.m. when he awoke in a bad temper and demanded money for more drink from his wife. This she refused whereupon he used filthy language to her and told her to get out. When she did not comply he pushed her out into the small hall and partly into the street. She did not fall and was not hurt. She went to her mother's house in Dufferin Street and did not thereafter live with her husband at 38 Sheriff Street or elsewhere.

Wilson for the petitioner.
McGrath for the respondent.

Cur. adv. vult.

Lord MacDermott L.C.J. after stating the facts substantially as set out above continued: Such is the alleged act of desertion. Treated in isolation, I do not think it would suffice to justify a decree for dissolution on any view of what constitutes a constructive desertion. The circumstances of the separation must, however, be considered against the background of the matrimonial history and this I find very difficult to determine with any approach to accuracy. Both spouses were far from reliable in their recollection of events, and after so long it is almost impossible to ascertain the

extent to which the respondent's shortcomings affected their relationship. That he had shortcomings admits of no dispute. He drank to excess and when in drink was ill-tempered, ill-tongued and quarrelsome. But no attempt was made to suggest that his treatment of the petitioner ever amounted to cruelty and she admitted that he was sensible and kind enough when sober. Still, I think she had a lot to put up with and I have come to the conclusion that the circumstances of the separation on April 22, 1946, taken in conjunction with her husband's drunken habits, were such as to justify her withdrawing from the matrimonial home until, at any rate, he had mended his ways. If, therefore, the respondent had brought proceedings on the ground of the petitioner's desertion I think he would clearly have failed, if only because she would have been in a position to plead "reasonable excuse" for her departure.

But does this view suffice in itself to justify the Court in holding the respondent guilty of constructive desertion? In *Hull v. Hull*[1], in which I gave judgment in this court on November 19, 1945, I find I answered this question in the negative in a passage which reads as follows—"But in cases of constructive desertion such as "this the petitioner has to prove more than cause for her departure. "As Bucknill J. put it in *Boyd v. Boyd*[2], 'Before there can be a case "of constructive desertion, the court must be satisfied that the "conduct of the husband was such as to show a clear intention "on his part to drive the wife away. There must be an intention "on the part of the person charged with desertion to bring the "cohabitation to an end.' For the petitioner Mr. McQuitty stressed "the fact that she had threatened to leave her husband on a number "of occasions prior to the incident which led to her departure in "January, 1941, and he contended that the husband must be taken "as intending to bring about the consequence of his ill-behaviour "which actually happened. No doubt an intention to drive away "the injured spouse may be inferred from the conduct of the "offending party in certain cases, but on the facts of this case I "have found myself unable to arrive at such a conclusion. Regarding the evidence as a whole I think it shows that the respondent "was inconsiderate and ill-behaved to a degree, but in my opinion "it falls short of showing that he wanted his wife to leave him."

The view of the law which I rejected in *Hull v. Hull*[1] is closely associated with the school of thought which would make the test

[1] (1945) 12 Ir. Jur. R. 59.

[2] [1938] 4 All E.R. 181, 182.

of constructive desertion entirely objective and which, with its more subjective rival, is very clearly described by Denning L.J. in *Hosegood v. Hosegood*[1]. I need not review in this judgment the various English decisions since *Hull v. Hull*[2] which have favoured an objective test. They and the problem they illustrate have recently been the subject of close consideration by the Judicial Committee in the important Australian case of *Lang v. Lang*[3]. As I understand the judgment of the Board in that appeal, as delivered by Lord Porter, it holds against the purely objective approach and decides —(1) that to constitute constructive desertion an intention to disrupt the marriage or to bring the cohabitation to an end must be proved against the spouse alleged to have deserted; and (2) that a presumption in favour of that intention based upon the conduct of such spouse and its natural and probable consequences, though rebuttable, will not necessarily be rebutted by showing that the offending spouse did not want the other to depart, it being possible for a person to wish one thing and intend another.

Reconsidering what I said in *Hull v. Hull*[2] in the light of the judgment in *Lang v. Lang*[3] it is, I think, still sound to say that the petitioner must prove more than reasonable cause or excuse for leaving the matrimonial home. The evidence must be such as to satisfy the court either directly or as a matter of inference that the respondent intended to bring the consortium to an end. Does the evidence here go this length? I have not the least hesitation in holding that the respondent did not want his wife to leave him. Whatever his faults, he appreciated her as a good mother and housewife and there is nothing to indicate that he had become attached to some other woman. When I decided *Hull v. Hull*[2] I think I would have regarded this finding as fatal to the petitioner's case. Now, I think I must go further and, with the distinction in mind which is emphasised in *Lang v. Lang*[3], ask myself whether the respondent's conduct was such that, despite his desire to have his wife remain with him he none the less intended to create a situation which he knew or ought to have known would justify her departure and, in all probability, cause her to go.

As already indicated, I cannot find against the respondent on this issue solely on the events of April 22, 1946. And the evidence, such as it is, as to the history of the marriage before that does not, in my opinion, warrant a different conclusion. That the respondent's

[1] (1950) 66 T.L.R., pt. 1, 735.
[2] (1945) 12 Ir. Jur. R. 59.
[3] [1955] A.C. 402.

drinking habits often made the union an unhappy one I have no doubt. But on the testimony offered I am not satisfied that his ill-conduct was so flagrant or so persistent as to justify me in holding that his intentions were at variance with his desire that the marriage should continue. While I have a good deal of sympathy for the petitioner I cannot but feel that to grant her the relief she wants would, in the circumstances, be tantamount to recognising drunkenness as a ground for divorce in itself.

For these reasons I am not satisfied that the petitioner has proved her case and the petition must, therefore, be dismissed.

Solicitors for the petitioner: *Sheldon & Stewart.*
Solicitors for the respondent: *B. Campbell & Co.*

J.P.

IN RE MARSHALL BROTHERS, BELFAST, LTD[1].

Company—Winding up—Distribution of surplus assets—Rights of preference and ordinary shareholders—Companies Act (Northern Ireland), 1932 (22 & 23 Geo. 5, c. 7), s. 219.

On the winding up of a private company, the surplus assets, after satisfying all liabilities and repayment of capital to shareholders, amounted to approximately £15,000. Part of the surplus was held in a special reserve fund and consisted of post-war refunds of excess profit tax. The balance was held upon profit and loss account and included a sum of £1,500 profit on sale of the company's business. The original capital consisted of ordinary shares, but preference shares were later issued. The rights of shareholders on winding up were not defined in either the memorandum or articles of association, or in the resolutions creating the preference shares.

Held, (i) that the sum of £1,500 profit on the sale of the business ought to be divided amongst all the shareholders in proportion to the shares held by them, whether preference or ordinary;

(ii) that the remainder of the surplus assets, being in the nature of uncapitalised profits, should be divided amongst the holders of ordinary shares in the company.

ORIGINATING SUMMONS.

The company was incorporated as a private company on April 7, 1925, under the Companies Acts, 1908 to 1917, for the purpose (inter alia) of carrying on the business of wine and spirit merchants, with a capital of £1,000 consisting of ordinary shares of £1 each. The company had power under its memorandum to increase its capital by the creation and issue of new shares, including preference shares. Such increases were made from time to time, and at the date of the winding up all the shares, both ordinary and preference, were fully paid up, making a total of 5,000 ordinary shares and 10,000 preference shares in the company. After satisfying all the liabilities of the company, repayment of capital to all the shareholders and payment of the costs of liquidation, the surplus assets amounted to approximately £15,000 of which sum £878 7s. 0d., representing post-war refunds of capital excess profit tax, was held in a special reserve fund. The balance was held upon profit and loss account and was described as being derived from undistributed and uncapitalised profits of the company. Such profits included loan interest, bank deposit interest, discount received on payment of income tax, profit on conversion of foreign currency and profit on the sale of the company's business, the latter amounting to £1,500 approximately.

[1] In the Chancery Division before Curran J.: July 30, 1954; May 12, 1955.

The only regulations of the company relating to the rights of shareholders were those contained in articles 3 and 4 of Table "A" of the Companies (Consolidation) Act, 1908, which was adopted in part as the articles of association of the company. There was no provision in either the memorandum or articles or in the resolutions creating the preference shares as to the rights of shareholders of the company in the event of winding up. The liquidator brought this summons for the purpose of ascertaining whether he should distribute the surplus assets amongst all the members of the company in proportion to the shares held by them, both preference and ordinary, or solely amongst the holders of the ordinary shares, or how otherwise the same should be distributed.

McLean for the liquidator.
Phelan for the representative of the preference shareholders.
Bready for the representative of the ordinary shareholders.

Cur. adv. vult.

CURRAN J.: The question I have to answer in this case is as to the distribution of the surplus assets of the company remaining and available for distribution after satisfying all the liabilities of the company, repaying the capital to all the shareholders and paying the costs of liquidation amongst all the members of the company in proportion to the shares held by them. The nett issue is as to whether the preference shareholders are entitled to participate in such distribution.

The difficulty has arisen in the present case by reason of the fact that the rights of preference shareholders have not been defined. Clause 5 of the memorandum of association empowered the company to increase its capital by the creation and issue of new shares; to issue any shares in the original or increased capital as ordinary preferred, deferred or guaranteed shares; and to attach to any class or classes of such shares any preferences, rights, privileges or conditions, or to subject the same to any restrictions or limitations that may be determined by any such resolution of the company passed before the issue of the shares affected thereby. Resolutions were passed increasing the capital by a total of 10,000 6½% cumulative preference shares of £1 each. Apart from the fact that the shares were described in the various resolutions as 6½% cumulative preference shares of £1 each the rights of the preference shareholders were not set out either in the memorandum or articles of association.

In these circumstances it is contended on behalf of the preference shareholders that they are entitled to participate in the distribution of the surplus assets along with the ordinary shareholders. On the other hand counsel on behalf of the ordinary shareholders contends that the preference shareholders are entitled only to their capital and accrued dividends.

Section 219 of the Companies Act (Northern Ireland), 1932, provides as follows:

> "Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities pari passu, and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company."

In the present case the articles make no provision as to such distribution. Accordingly, such distribution is to be amongst the members according to their rights and interests in the company. In order to ascertain what are the rights and interests of the preference and ordinary shareholders respectively it is necessary to ascertain the nature of the surplus assets with which we are dealing. Such assets consist of—

(a) £1,500 profit on sale of the company's business.

(b) £878 7s. 0d. of post-war refunds of capital excess profit tax which was held in a special reserve fund.

(c) The balance of the surplus assets was held upon profit and loss account and was derived from undistributed and uncapitalised profits of the company. Such profits included loan interest, bank deposit interest, discount received on payment of income tax, and profit on conversion of foreign currency.

So far as item (a) is concerned the principle upon which this sum should be distributed is, in my opinion, decided by the House of Lords in *Birch v. Cropper*[1]. Accordingly, my opinion is that this sum of £1,500 ought to be divided amongst the holders of all the shares in the company in proportion to the shares held by them respectively.

So far as items (b) and (c) are concerned, the sum of £878 7s. 0d. and the said balance being made up of what may be conveniently described as uncapitalised profits, I am of opinion, having regard

[1] (1889) 14 App. Cas. 525.

to the decision of the Court of Appeal in *In re Bridgewater Navigation Company*[1], that this sum ought to be divided amongst the holders of the ordinary shares in the company in proportion to the shares held by them respectively.

Counsel for the preference shareholders relied upon the decisions and dicta in a number of later authorities including *The Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co., Ltd.*[2], *Re Isle of Thanet Electricity Supply Co., Ltd.*[3], and *Re John Smith's Tadcaster Brewery Co., Ltd., The Company v. Gresham Life Assurance Society, Ltd. and Anor.*[4]. These cases were concerned with the position of preference shareholders where the articles set out their rights and the onus was held to be on the preference shareholders to show that their rights were not exhaustively defined by the articles and to prove that on a winding up they were entitled to share in the surplus assets. Where the articles, as in the present case, have not attempted to define the rights of the preference shareholders I am of opinion that the authorities upon which I rely still apply.

Declaration accordingly.

Solicitors for the liquidator: *T. H. Cairns & Co.*
Solicitor for the preference shareholders: *Francis Hanna.*
Solicitor for the ordinary shareholders: *Michael J. Bready.*

S.M.M.

1 [1891] 2 Ch. 317.
2 [1949] 1 All E.R. 1068.
3 [1949] 2 All E.R. 1060.
4 [1952] 2 All E.R. 751.

IN RE STEWART: STEWART v. STEWART[1]

Local Registration of Title—Failure to register lands purchased under Land Purchase Acts—Devolution on intestacy—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *Part IV.*

The owner of lands which had been purchased in 1886 under the Land Purchase Acts but which had never been registered, died intestate. The lands were claimed by the widow as next of kin and by a nephew as heir at law.

Held, that as the lands were purchased prior to the Local Registration of Title (Ireland) Act, 1891, they were not, in the absence of registration, affected by Part IV of that Act, and consequently devolved upon the heir at law.

Re Mary Smith (1897) 33 I.L.T.R. 69 followed.

ORIGINATING SUMMONS.

By indenture dated October 14, 1886, the Salters Company of London conveyed the fee simple in a farm of land to John Diamond, and by the same deed the purchaser conveyed the holding to the Irish Land Commission with a reversion. The conveyance to John Diamond was effected under the Purchase of Land (Ireland) Act, 1885, and should have been registered under section 22 of the Local Registration of Title (Ireland) Act, 1891, but no registration ever took place. Charles Stewart, a successor in title of John Diamond, died in 1913 devising the lands by will to his third son Joseph Stewart, the above named deceased. The present plaintiff was the eldest son of Robert Stewart, who was the eldest son of Charles Stewart, and claimed the lands as heir at law of Joseph Stewart who died intestate and without issue. The defendant was the widow and administratrix of the said Joseph Stewart and claimed the property as next of kin.

McSparran for the heir at law. There is no principle upon which these lands could be regarded as if they had been registered: *Brady v. Brady*[2]. Until registration the lands, which are freehold, must descend as realty: *Re Mary Smith*[3]. That case decided that until registration is completed the devolution of the lands is not affected. The cases of *M'Donnell v. Stenson*[4] and *Collins v. Collins*[5] were wrongly decided. In the latter case the Master of the Rolls stated that he was bound by the former but gave his opinion that it was not a satisfactory decision. In any event both those cases can be distinguished on the ground that in each the lands were purchased after the passing of the 1891 Act. In the present case the lands were purchased in 1886, and the position is governed by the deci-

[1] In the Chancery Division before Curran J.: Oct. 20, 1952; May 9, 1955.
[2] [1936] I.R. 431.
[3] (1897) 33 I.L.T.R. 69.
[4] [1921] 1 I.R. 80.
[5] [1924] 1 I.R. 72.

sion in *Smith's* case[1] which was followed in *In re Desmond: Creed v. Kearney*[2].

Watt for the administratrix. On the authority of the decision in *M'Donnell v. Stenson*[3] the land ought to devolve in accordance with Part IV of the 1891 Act as if it were a chattel real. In that case, which was a decision of the Court of Appeal, O'Connor L.J. said: "On the plain ground that equity considers that as done which "ought to have been done, I consider that Barbara M'Donnell, "at the time of her death, held these lands as equitable owner in "fee, the fee being, by statute, descendible as personalty." That case was followed in *Collins v. Collins*[4] which also went to the Court of Appeal. If registration had taken place the lands would have devolved as personalty, and as registration is compulsory under the 1891 Act it is right that the next of kin should now be entitled to the lands.

Cur. adv. vult.

CURRAN J.: By a conveyance dated October 14, 1886, the Worshipful Company of Salters conveyed the lands in question to one John Diamond in fee simple. It is claimed that Joseph Diamond, son of the said John Diamond, conveyed the lands to Charles Stewart in or about the year 1910. The said Charles Stewart was the father of the above named Joseph Stewart deceased, who became owner of the lands when his father died in the year 1913.

The question raised in this case is whether the lands go to the heir at law of Joseph Stewart or to his next of kin under Part IV of the Local Registration of Title (Ireland) Act, 1891. The difficulty arises by reason of the fact that the lands were never registered under the 1891 Act.

I am satisfied that this case is covered by the decision in *Re Mary Smith*[1] and that the lands go to the heir at law. The conflict of opinion found in the cases of *M'Donnell v. Stenson*[3] and *Collins v. Collins*[4] on the one hand, and *In re Desmond: Creed v. Kearney*[2] on the other, does not affect this case having regard to the fact that the fee simple interest was conveyed to John Diamond in the year 1886.

Declaration accordingly.

Solicitor for the plaintiff: *E. Malachy Doris.*
Solicitor for the defendant: *R. Evan Burns.* S.M.M.

[1] (1897) 33 I.L.T.R. 69
[2] [1943] I.R. 534.
[3] [1921] 1 I.R. 80.
[4] [1924] 1 I.R. 72.

ARMSTRONG v. NORTHERN IRELAND HOSPITALS AUTHORITY[1]

Health services—Contract—Rights of "transferred officers"—Compulsory retirement—Superannuation—Health Services Act (Northern Ireland), 1948 (11 & 12 Geo. 6, c. 3), s. 58(2).

By section 58(2) of the Health Services Act (Northern Ireland), 1948, an officer of any hospital transferred to the employment of the Hospitals Authority by virtue of that Act "shall be employed by the Authority on terms and conditions (including conditions as to superannuation benefits) and in circumstances not less advantageous than were applicable to his employment with that hospital...." The Act further provided for the making of regulations for the superannuation of officers of the Authority and for the granting to persons already entitled to participate in other superannuation benefits of an option to retain rights corresponding with those previously enjoyed by them in lieu of the rights which they would otherwise enjoy under the regulations.

At the coming into force of the Act of 1948 the plaintiff was employed at a hospital under conditions which did not impose any obligation to retire on attaining a particular age, and which secured to him a pension allowance if he should cease to hold office by reason of permanent infirmity or old age. On being transferred to the employment of the Authority the plaintiff elected to retain the superannuation rights corresponding with those previously enjoyed by him. In 1949 the plaintiff was regraded and was offered, and he accepted, an appointment under a contract which contained a condition terminating his appointment on his reaching the age of 65 years.

The plaintiff claimed that, as a transferred officer, he was entitled to retain the benefit of his former conditions of employment which did not require him to retire on attaining a particular age. It was further argued on his behalf that to give effect to the condition requiring him to retire at the age of 65 would deprive him of the benefit of superannuation rights previously enjoyed since these were subject to the condition precedent that retirement should be caused by permanent infirmity or old age. For the Hospitals Authority it was contended (inter alia) that section 58(2) applied only to transferred officers who had not accepted contractual employment under the Authority.

Held, by the Court of Appeal (Lord MacDermott L.C.J. and Porter and Black L.JJ.), (i) that in determining whether the terms, conditions and circumstances of a transferred officer's employment were less advantageous than those applicable to his former employment it was necessary to have regard to the terms, conditions and circumstances viewed as a whole;

(ii) that a requirement to retire at the age of 65 could be equated to a retirement on account of incapacity due to age, and that accordingly the plaintiff would not lose his superannuation rights on being required to retire at the age of 65;

(iii) (Black L.J. dissenting on this point), that the provisions of section 58(2) applied both to officers who were simply transferred to the employ-

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Porter and Black L.JJ.: May 9, 10, 11, 12; July 29, 1955.

ment of the Authority by the operation of the Act and also to those transferred officers who were subsequently employed by the Authority on a contractual basis.

APPEAL to the Court of Appeal from a decision of Curran J. on the hearing of an originating summons. The facts and arguments of counsel appear sufficiently in the judgment of the Lord Chief Justice.

Harrison Q.C. and *Gibson* for the appellant.

Patton Q.C., *Nicholson Q.C.* and *Boal* for the Hospitals Authority.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: This appeal raises several questions as to the meaning and effect of certain provisions of the Health Services Act (Northern Ireland), 1948, (hereinafter called "the Act of 1948") and of the Health Services (Superannuation) Regulations (Northern Ireland), 1948, (hereinafter called "the Superannuation Regulations"); but its main issue is whether the defendants (hereinafter called "the Authority") were entitled to terminate the plaintiff's employment and dispense with his services when he reached 65 years of age.

To explain what has produced this issue and the nature of the questions associated therewith, it is necessary to refer not only to the relevant facts respecting the plaintiff's career as a medical officer before and after the passing of the Act of 1948, but also to some of the enactments which at one time or another affected him in that capacity.

On December 23, 1919, the Board of Guardians of the Belfast Union appointed the plaintiff to the part-time post of visiting medical officer in connection with a child welfare scheme. The duties of this office included the care and medical treatment of all children admitted to the Belfast Infirmary (later known as the Belfast City Hospital) and other institutions maintained by the Belfast Guardians. The plaintiff's commencing salary was £200 per annum, rising by annual increments to £280 per annum. This remuneration was increased from time to time and on March 21, 1946, it became £700 per annum. It was still at that figure on July 5, 1948, when the Belfast City Hospital was transferred to the Authority under section 23 of the Act of 1948. The material terms and conditions of this employment by the Guardians were mainly statutory. Article 39

of the General Order dated December 18, 1882, for regulating the proceedings of Boards of Guardians in Ireland and the appointment and duties of union officers, provided that (subject to article 40) every officer appointed to or holding office under the order—an expression wide enough to include the plaintiff—should "continue to hold the same until he die, or resign, or be removed by the Local Government Board...." Article 40 provided that Boards of Guardians might (with certain exceptions not now material) at their discretion suspend a union officer from the discharge of his duties. Such suspension was to be reported forthwith to the Local Government Board together with the cause thereof. If it removed the suspension the officer was to "remain and continue to discharge his duties." But if the decision was not to remove the suspension the Guardians were empowered to dismiss the officer concerned. There can, I think, be little doubt that the effect of these provisions, as respects the plaintiff's appointment as an officer of the Belfast Union, was that he was entitled to continue in the office to which he had been appointed until he died, or resigned, or was removed by the Local Government Board, or was dismissed by the Guardians after having first been suspended from his duties for cause and after such suspension had been confirmed by the Local Government Board. As a union officer the plaintiff, therefore, enjoyed the right to remain in office until one or other of these specified events happened and without being under any obligation to retire on attaining a particular age.

For reasons appearing later the plaintiff's pension position as a union officer is also material. This involves reference to three Acts of Parliament. The first of these is the Union Officers (Ireland) Superannuation Act, 1865, section 1 of which empowered the Guardians of Unions, with the consent of the Poor Law Commissioners, to grant to any whole-time officer "who shall become incapable of discharging the duties of his office with efficiency. by reason of permanent infirmity of mind or body, or of old age, upon his resigning or otherwise ceasing to hold his office, an annual allowance not exceeding in any case two-thirds of his then salary ...." Section 2 provided that this allowance was not to be assignable or chargeable with the officer's debts or other liabilities, and section 3 enacted that no officer should be entitled to an allowance on the ground of age who had not completed the full age of 60 and served as a union officer for twenty years at least. By section 1 of the Medical Officers' Superannuation Act (Ireland), 1869, the powers thus conferred upon Boards of Guardians were ex-

tended to include part-time medical union officers. Then, by paragraph (a) of section 2 of the Union Officers (Ireland) Act, 1885, provision was made to enable Boards of Guardians to grant an annual allowance by way of compensation for loss of office to "any person retiring or removed from the service of the Union by "reason of the abolition of his office" to whom a superannuation allowance might be granted under the Act of 1865 in the same manner as if such person were retiring from office by reason of permanent infirmity of mind or body. Paragraph (b) of section 2 of the Act of 1885 may also be mentioned as affording an example of the kind of event to which that section related. It authorised Boards of Guardians "in the case of the abolition of an office "arising from the dissolution or alteration of a union" to grant an allowance under paragraph (a) at a meeting held before the abolition took effect.

I do not pause at this stage to summarise the superannuation rights or expectations of the plaintiff under these provisions. Their effect in present circumstances must be considered later, but it may help to focus attention on what is important if I point out that they make no express provision for the situation which has now arisen, namely, the termination of the plaintiff's employment on his attaining 65 years of age but without being, on that account or for any other reason, incapable of efficiently discharging the duties of his office. His competence in this respect has not been questioned and for this and other reasons there is no need to describe his duties in detail. Suffice it to say that they were performed, for the most part, at what is now the Belfast City Hospital and that their nature remained substantially unaltered following the transfer of that hospital to the Authority.

As already mentioned, the Belfast City Hospital was by virtue of section 23 of the Act of 1948 transferred to the Authority on July 5, 1948, and it will now be convenient to refer to certain parts of that legislation and to what happened to the plaintiff after that date. By section 58(1) of the Act of 1948 it was provided, subject to several immaterial exceptions, that "all officers employed "immediately before the appointed day solely or mainly at or for "the purposes of any hospital transferred to the Authority under "section twenty-three of this Act shall on that day become by virtue "of this section officers of the Authority." Then, by section 59(1) provision was made concerning certain officers who did not fall

within section 58(1) whereby the Ministry of Health and Local Government (hereinafter called "the Ministry") was placed under a duty to direct that section 58(1) should apply to such officers in like manner as it applied to an officer "who immediately before "the appointed day is employed solely or mainly at or for the "purposes of a hospital." The Ministry made a direction in respect of the plaintiff under section 59(1). The plaintiff took the view that section 58(1) already applied to him. It is unnecessary to resolve this difference and the court was not asked to do so, both parties being agreed that, one way or the other, section 58(1) applied to the plaintiff and that he accordingly became an officer of the Authority on July 5, 1948, the appointed day.

Part VI of the Act of 1948 deals, amongst other matters, with the appointment and terms of service of officers of the Authority. Subsection (2) of section 57 empowers the Authority to appoint officers. Subsection (3) of the same section provides that the number, qualifications, remuneration and conditions of service of officers of the Authority shall be determined by the Authority, subject, in such cases and to such extent as may be prescribed, to the approval of the Ministry. And subsection (4) says that the appointment and removal from office of such officers as may be prescribed shall be subject to the approval of the Ministry. Subsection (2) of section 58 has a special importance in this case. It applies to the plaintiff as one who became an officer of the Authority under subsection (1) of that section. It reads as follows:

"(2) An officer of any hospital who, by virtue of the fore- "going provisions of this section, becomes an officer of the "Authority shall be employed by the Authority on terms and "conditions (including conditions as to superannuation benefits) "and in circumstances not less advantageous than were applic- "able to his employment with that hospital—

"(a) on the twenty-first day of March, nineteen hundred and "forty-six; or

"(b) where such officer was not employed by the hospital on "that date, on the day on which he entered that em- "ployment."

Subsection (3) of section 58 was also the subject of discussion and I had better quote it too. It is in these terms:

"(3) Where, in any case to which paragraph (a) of the last "preceding sub-section applies, the terms and conditions applic-

"able to the employment become, after the date specified in the "said paragraph, more advantageous to the officer by reason "of any increase of salary or other additional benefit, the Ministry "may, if it thinks fit, direct that the right to that increase or "benefit shall be included among the terms and conditions on "which the officer is employed by the Authority; and where "such a direction is given with respect to any officer the pro- "visions of the last preceding sub-section shall in relation to "that officer have effect subject to the said direction."

Section 61 authorises the making of regulations for the superannuation of (amongst others) officers of the Authority and, by subsection (1)(h), specifies that such regulations may provide:

"(h) for granting to persons who immediately before becoming "entitled to participate in superannuation benefits pro- "vided under or by virtue of the regulations, were entitled "to participate in other superannuation benefits, an op- "tion to retain rights corresponding with those previously "enjoyed by them in lieu of the rights which they would "otherwise enjoy under or by virtue of the regulations;"

On June 24, 1948, the Ministry, with the approval of the Ministry of Finance, made the Superannuation Regulations (S.R. & O. 1948, No. 161) under the powers conferred by section 61. Of these special reference must be made to regulation 22(1), which applies to, amongst others, a person such as the plaintiff who became an officer of the Authority immediately after having been subject to the provisions of the Union Officers (Ireland) Superannuation Act, 1865, or the amending Act of 1869, to which I have already referred. It provides that if such a person—

".... notifies the employing authority in writing within three "months after becoming such officer that he does not wish to "avail himself of the benefits provided by these regulations, the "provisions of this Part shall apply to and in respect of him, as "if, in relation to his employment as such officer, they required "him to make the like contributions (if any) as he would have "been liable to make and conferred upon him rights corresponding "with those which he would have enjoyed if he had remained "subject to the enactment or scheme previously applicable in "his case, and those provisions shall continue so to apply to "and in respect of him so long as he is an officer of any em- "ploying authority without a break in employment of more than

"twelve months, and without his having during any break in "employment become entitled to participate in superannuation "benefits by virtue of employment otherwise than under an "employing authority...."

On October 1, 1948, the plaintiff, in accordance with the option afforded him by regulation 22, duly elected not to avail himself of the normal benefits provided by the Superannuation Regulations but to accept in lieu thereof rights corresponding with those which he would have enjoyed had he remained subject to the enactment or scheme to which he was subject immediately before July 5, 1948. Subsequently, by S.R. & O. No. 115 of 1950 officers who thus elected were, for a period of six months from August 1, 1950, allowed, in effect, to retract their election. The plaintiff did not, however, avail himself of this opportunity and his superannuation position has now to be considered on the basis that the option he exercised was and still is effectual.

On the passing of the Act of 1948 the Authority were faced with the formidable task of organising a hospital service and providing for the employment of the requisite medical and other officers. In doing this the Authority consulted with the professional bodies concerned as to the applicability of the report of the Spens Committee on the remuneration of consultants and specialists in Great Britain and as to the terms and conditions of service of hospital medical and dental staff. In the result, and with certain amendments which have no present relevance, the Authority's memorandum known as "Memorandum S/1/1949" was adopted as the basis of the contracts to be made with their medical officers by the Authority. A grading scheme for such officers was envisaged by this memorandum and may, indeed, be said to form an essential part of it as the scales of remuneration which had been settled following consideration of the Spens report were related to specific grades. On November 8, 1949, the Authority wrote the plaintiff a letter which commenced in these terms:

"Dear Sir,

"I refer to your application for grading in terms of the Author- "ity's Memorandum S/1/1949 dated 7th July, 1949, and I am "now instructed to inform you that, acting on the advice of the "Grading Committee for Northern Ireland, the Authority have "graded you as follows:—

"Senior Hospital Medical Officer (Part-time) from 5th July, "1948.

"A formal offer of appointment for a period subsequent to "1st January, 1950, will be sent to you shortly, the terms and "conditions of service therein contained being those appropriate "to the foregoing statement of your grading.

"I am also directed to give you formal notice that your existing "appointment as an officer of the Authority with the whole "terms and conditions pertaining thereto will terminate finally "on 31st December, 1949, (unless you are a transferred officer "under Section 58 of the Health Services Act and elect to continue "to be employed on the scale of salary and conditions of service "applicable to you before 5th July, 1948)...."

The letter continued with a reference to appeals against gradings and gave detailed instructions as to the procedure to be followed by those who wished to appeal. The plaintiff exercised this right of appeal and on January 26, 1950, the Authority wrote informing him that, acting on the advice of the Grading (Appeals) Committee for Northern Ireland, they had decided to change his grading to that of consultant. This letter concluded by saying: "An offer of "a formal contract giving effect to the Authority's decision, as "stated above, will be sent to you shortly." On January 31, 1950, the Authority again wrote to the plaintiff offering him a part-time appointment from January 1, 1950, as consultant in paediatrics. This offer was expressed to be subject to (a) the provisions of the Act of 1948 and the regulations made thereunder, (b) the terms and conditions of Memorandum S/1/1949, as amended, and (c) the terms and conditions of appointment as set out in the letter. Of these last mentioned terms and conditions No. 2 provided that the appointment should not be terminated without at least three months' notice on either side, and No. 6 stipulated that the plaintiff's remuneration would be at the rate appropriate to his grading. Mention must also be made of one of the terms and conditions of Memorandum S/1/1949 which is referred to in the Authority's offer. This, which is paragraph No. 15 of Part I of that memorandum, reads, with the omission of what is not material, as follows:

"When an officer reaches age 65 his regular contract shall "come to an end provided that:

"(a) the Authority may, with his consent, extend his contract "of service (or offer a modified contract) for one year "or any less period, and so on from time to time until "age 70, or

"(b) in the case of a consultant the Authority may allow him "an honorary contract as indicated in paragraph 6."

By letter dated February 3, 1950, the plaintiff accepted the offer thus made by the Authority "on the terms and subject to the con- "ditions of service referred to" in their letter of January 31. The contract so formed appears to have been acted upon by both parties at once, the plaintiff discharging the consultant duties therein specified and the Authority paying him therefor, at the rate appropriate to his consultant status, a salary much in excess of that which he had previously enjoyed. So matters went on until early in 1952 when the plaintiff learnt of a scheme for the reorganisation of the paediatric services in Northern Ireland which contemplated his early retirement. Having been born on May 29, 1887, the plaintiff was then approaching his 65th birthday, and on January 5, 1952, he wrote to the Authority stating that it was not his intention to retire and pointing out that he was a transferred officer under section 58 of the Act of 1948. This protest concluded with the following paragraph:

"I have chosen to take advantage of the privilege conferred "upon me by that Act to retain the conditions of my original "employment under the Belfast Board of Guardians and the "laws governing such employment, one of which makes it clear "that I am not required to relinquish my position as Visiting "Medical Officer on attaining any specific age. My general health "and capacity to continue in the active prosecution of the work "of my appointment are not impaired or in doubt."

It is unnecessary to go into the considerable correspondence which passed between the parties after this. It is enough to say that the plaintiff maintained the view that paragraph 15 of Memorandum S/1, 1949 did not apply in his case having regard to his previous conditions of service and the terms of the Act of 1948, and that the Authority took the view that this stipulation was applicable to and binding upon the plaintiff. As the Authority had agreed that in the case of consultants attached to teaching hospitals retirement should take place at the end of the academic year in which the consultant reached his 65th birthday, they did not insist upon the plaintiff retiring as soon as he attained 65 years of age. But they were adamant that he should do so on September 30, 1952, and as from that date his services were dispensed with.

The issue thus joined between the parties was not made the subject of a plenary suit, but various aspects of it were brought

before Curran J. for determination by an originating summons entitled in the matter of the Act of 1948 and of the contract between the parties to which I have referred. It will, I think, be convenient if, at this stage, I set out the questions concerning this contract, as they were submitted in the summons, together with the answers given by Curran J. and the answers which the plaintiff now asks this Court to substitute for those answers. These questions, answers, and suggested answers are as follows:

Question 1: "Whether the defendants had power to enter into "the said contract with the plaintiff providing for the appoint- "ment of the plaintiff as Consultant in Paediatrics (part-time)."

Answer: "*Yes.*"

[Suggested Answer: "*Yes, except clause* 15 *thereof, and condition* "2 *set out in the defendant's letter dated the* 31*st day of January,* "1950, *which is incorporated in the said contract.*"]

Question 2: "Whether, assuming the answer to the foregoing "question is 'yes' the said contract provides for the termination "of the plaintiff's appointment as Consultant in Paediatrics on "his attaining the age of sixty five years."

Answer: "*Yes.*"

[Suggested Answer: "*The said term was invalid as ultra vires the* "*parties.*"]

Question 3: "Whether, assuming the answer to question (2) is "'yes' the term of the said contract which provides for the "termination of the plaintiff's appointment as aforesaid is valid "and enforceable."

Answer: "*Yes, but he must be paid a superannuation allowance or* "*offered suitable employment by the Authority.*"

[Suggested Answer: "*The said term was invalid as ultra vires the* "*parties.*"]

Question 4: "Whether, assuming the answer to question (3) is "'no' the said term of the said contract is severable from the "other terms of the said contract."

Answer: "*Does not arise.*"

[Suggested Answer: "*Yes.*"]

No objection was taken before us or in the court below to the form of the proceedings, and I do not therefore propose to enter upon a technical scrutiny of the questions submitted. It is, however, obvious that the procedure adopted circumscribes the jurisdiction

of the court and, in particular, precludes it from dealing with any conflict of fact.

As already mentioned, the main issue between the parties, namely, whether the Authority were entitled to terminate the plaintiff's employment upon his reaching the age of 65, also involves an examination of the plaintiff's superannuation position. But I think it will make for clarity if, without forgetting this, I first of all proceed to consider the contractual situation as though the plaintiff had not exercised the option given him by regulation 22 and had, in consequence, become entitled to the normal superannuation benefits provided by the Superannuation Regulations for medical officers who retire on attaining the age of 65 years.

It is perhaps as well to commence my observations on this aspect of the case by saying that, so far as I can see, there is nothing to prevent the Authority from contracting with a former union medical officer who, like the plaintiff, has been transferred to their service and has become their officer by the operation of section 58(1) of the Act of 1948. Their powers seem ample for the purpose and I cannot discern anything in the policy of this legislation to require that an officer of this class should have his appointment permanently regulated on a statutory rather than a consensual basis. This, indeed, was not disputed before us, but counsel for the plaintiff submitted that consensus in this connection was not at large, that it had to conform to the provisions of subsection (2) of section 58 and that any stipulation contrary to those provisions was void and of no account.

Before taking this submission further it is necessary to reach a conclusion as to its primary proposition. Does this subsection apply to contracts made with transferred officers (by which I mean officers becoming officers of the Authority under subsection (1)) or does it, as counsel for the Authority contended, serve only to define the terms and conditions of service for transferred officers who have not contracted with the Authority? Now there can be little doubt that when subsection (2) provides that transferred officers are to be "employed by the Authority on terms and con- "ditions (including conditions as to superannuation benefits) and "in circumstances not less advantageous than were applicable" to their previous employment, it is at least making provision for the period between the date of transfer and the date of the contract, if contract there be. In the nature of things some time would have to elapse before the employment of such officers could be put on

a contractual footing and it is reasonable to assume that the legislature did not intend to leave that period, so to speak, in the air. But was the subsection meant to go beyond that non-contractual phase? Counsel for the Authority relied upon subsections (1) and (2) of section 60 as showing that this question should receive a negative answer. Subsection (1) of that section declares an officer of a transferred hospital entitled to compensation for any direct pecuniary loss suffered by "being removed from or required to "relinquish his office or by the diminution of his remuneration" in consequence of "such transfer." As I understand it, the argument here was that this provision contemplated that a transferred officer might find himself employed by the Authority on less advantageous terms than formerly and that this would be in conflict with subsection (2) of section 58 if that subsection covered contractual as well as non-contractual employment. I cannot accede to this submission. It requires subsection (1) of section 60 to be read as applying to transferred officers, but, in my opinion, that is not the case. The words "such transfer" refer to the transfer of hospitals, not of officers, and I think the intention plainly was to provide for officers of a Board of Guardians whose duties were not solely or mainly concerned with the operation of the Union Hospital. Subsection (2) of section 60, on the other hand, does relate to transferred officers and provides for compensation for an officer of this class who (inter alia) within five years of becoming an officer of the Authority "relinquishes office by reason of his having been required to perform duties which are not analogous with or which are an unreasonable addition to those which he was required to perform immediately before he became such an officer." A similar argument was advanced in respect of this provision. It was said that it contemplated something happening which would be forbidden if subsection (2) of section 58 applied to contractual employment and that that subsection ought, accordingly, to be read as not having that application. While more weight must be given to this argument than to that founded on subsection (1) of section 60 I do not find it convincing. Subsection (2) of section 60 does not appear to be limited to cases of contractual service, but I do not base my view upon that consideration. My inability to accept the Authority's submission on this point lies in the difficulty I have in seeing any incompatibility between this provision and the plaintiff's interpretation of subsection (2) of section 58. Why should subsection (2) of section 60 not make special provision for relief in the case

of a particular breach of subsection (2) of section 58? I can find no sound reason against it doing so. If a breach of that, last mentioned, subsection is such as to cause the officer concerned to relinquish his office, it may well have seemed but fair and proper to the legislature that his right to compensation for his loss should be acknowledged and dealt with explicitly. Indeed, such significance as subsection (2) of section 60 may have in this connection appears to me to be rather against the Authority's argument; for it would surely be less anomalous to have that subsection applying to extra requirements which were in breach of subsection (2) of section 58 than to have it applying to extra requirements which might be the result of a free and binding contract.

For these reasons I am unable to find support for the Authority's contention in the terms of section 60 and I therefore turn to the language of subsection (2) of section 58. This, with its reference to "terms and conditions," is apt to include what is agreed, and there is certainly nothing in the natural meaning of the expression "shall be employed" to exclude contractual employment. There can be no doubt that when the reorganisation of hospital services was made a function of the Authority by the Act of 1948, contractual relations between the Authority and some at least of the many transferred officers must have been contemplated; and it would, I think, be strange if the measure of protection afforded such officers by subsection (2) of section 58 was meant to come to an end as soon as contracts were made. Had that been the intention one might reasonably have expected the Legislature to express itself differently, as by inserting the words "subject to any agreement to "the contrary." It is, however, true to say that, generally speaking, the law favours freedom of contract, and that when an Act of Parliament confers a benefit upon persons they may validly contract out of it unless the statute precludes such a step, either in terms or by manifesting an intention to confer the benefit as a matter of public policy and not merely in the interests of those directly concerned. Here there is no express provision against contracting out and the question arises whether subsection (2) is meant to lay down a rule of public policy as well as to protect the individuals composing the class of transferred officers. In view of the nature of this legislation I do not think there would be anything out of place or irrational about the wider of these purposes. Parliament, for example, may well have been anxious to ensure that the new hospital service should not suffer by the discontents likely to be fostered if the transferred medical staff either had to stay

as they were indefinitely or accept such terms as the Authority should choose to offer; or, again, it may have been felt that, apart from considerations as to what was fair and just between the Authority and their transferred officers, the success of the new scheme called for the avoidance of any appearance of conflict with section 68 of the Government of Ireland Act, 1920, which enacts (inter alia) that no law made by the Parliament of Northern Ireland shall have effect so as to prejudice or diminish the rights or privileges of any existing officer of a local authority under the provisions of the Local Government (Ireland) Acts. But while there is little difficulty in thus finding a possible public purpose for subsection (2) the question in debate remains one of construction and the intention of Parliament must, in the end, be determined in the light of the language it has used. That seems clear from such decisions as *Equitable Life Assurance Society of the United States v. Reed*[1]; *Salford Guardians v. Dewhurst*[2]; and *Lake View & Star Ltd. v. Cominelli*[3]. In the first of these cases Lord Dunedin, in delivering the judgment of the Judicial Committee, said[4]: "In all "cases where something not ipsa natura unlawful is prohibited by "statute, the words of prohibition must be taken as they stand; "they must not be amplified in order to meet a supposed evil, or "restricted in order to protect a natural freedom. In other words, "the evil that was to be checked can only be considered so far as "necessary for the interpretation of the words, but must not be "used for an independent determination of the scope of the remedy." It is, I think, well to bear that passage in mind in cases of this sort as considerations of public policy can be very speculative unless attached to the terms and subject matter of the legislation. What, then, does subsection (2) of section 58 enact according to the plain and natural meaning of its words? It is couched in what Lord Cave described in *Salford Guardians v. Dewhurst*[5] as "imperative "words, words of command, addressed to a public authority." It purports to apply to any officer who becomes an officer of the Authority under subsection (1) without making any attempt to distinguish between one category and another, and it says that such officer "shall be employed by the Authority on terms and "conditions and in circumstances not less advantageous than were "applicable to his former employment." I appreciate that the trans-

[1] [1914] A.C. 587
[2] [1926] A.C. 619
[3] [1937] A.C. 653
[4] [1914] A.C. at 595
[5] [1926] A.C. at 624

ferred officers form a transient class, but I think the proper conclusion to be drawn from the mandatory nature of this language is that subsection (2) was intended to lay down a rule of public policy and to apply to contractual employment. I am accordingly against the Authority's submission that on its true construction this subsection no longer applies once the transferred officer's employment by the Authority is placed on a contractual basis. It must therefore be regarded in considering the plaintiff's position under his contract, and the fact that he agreed with the Authority to certain terms and conditions cannot of itself render the subsection inapplicable though it may be very relevant on the question of what is advantageous and what is not.

The next question for consideration is whether subsection (2) should be applied distributively, that is, to each of the relevant terms, conditions and circumstances, or whether it should be applied comprehensively, that is, to the terms, conditions and circumstances of the employment as a whole. Counsel for the plaintiff contended in favour of a distributive application. Paragraph 15 of the incorporated Memorandum S/1/1949 was thus said to be void because, when set against the plaintiff's right as a union officer to hold his office as long as he was fit to discharge its duties efficiently, it was "less advantageous" and therefore contrary to subsection (2). And, similarly, condition 2 as set out in the Authority's offer of January 31, 1950, was said to be bad because it provided for termination of the plaintiff's appointment on three months' notice whereas in his former employment he enjoyed the more advantageous security of tenure which I have already described.

In my opinion this distributive interpretation is unsound and must be rejected. Subsection (2) is obviously directed to a change in terms, conditions and circumstances. But a change in one quarter which is advantageous to the officer may entail something disadvantageous in another, and it would have been putting a formidable obstacle in the way of the Authority's negotiations with their transferred officers if the advantages offered could not be balanced against the disadvantages. Such a situation might also produce much embarrassment and even hardship for the officer concerned. Take, for example, an instance suggested by the facts of this case. A, a transferred union officer, is offered employment by the Authority as a consultant at more than double his previous salary provided he agrees to retire at 65 and abandons his existing right to hold office as long as he is competent. Judged as a whole that offer might

be most advantageous to the officer and in the public interest as well. But if the plaintiff's contention is sound it could not lead to a valid agreement. I cannot believe that the Legislature ever intended so to shackle the contractual powers of the Authority and their transferred officers. Being of this view and finding the text of subsection (2) as capable of supporting the comprehensive construction as it is of supporting that just considered, I am of opinion that the subsection must be applied to the terms, conditions and circumstances of the employment as a whole.

The difficulties of subsection (2) of section 58 are by no means completely removed by the conclusions I have stated and it may now be well to add a word on one or two of the practical problems which it still presents. The first of these concerns the determination of the question whether or not subsection (2) has been complied with. The Act of 1948 lays down no special procedure for this purpose and there is little help to be found outside the subsection itself. In my view this question is essentially one of fact. The court that has to resolve it must weigh the terms, conditions and circumstances of the employment with the Authority against those of the former employment and find whether, all in all, they are less advantageous. In most cases where there has been a contract with the Authority the crucial time will be the date of the contract, and regard will properly be paid to what was then advantageous or the reverse from the point of view of the officer. As already indicated, the fact that he has agreed to certain terms will not of itself render the subsection inapplicable, but it may well be cogent evidence that the balance of advantage was in his favour and, normally, this consideration will be likely to gain weight with the passing of time and the enjoyment without protest of the advantages obtained by contracting. And here, to avoid any misunderstanding, I should perhaps make it plain that nothing I have said is intended to suggest that the special defences of laches and estoppel by conduct may not be open to Authority in proceedings brought to set aside a contract as in breach of subsection (2). I do not need to reach a decision on this in these proceedings; but I may say that, as at present advised, I see nothing in subsection (2) to modify or oust any estoppel which would otherwise be available as respects the issue of fact which the subsection raises.

Another point which may now be mentioned concerns the remuneration of the transferred officer. In the course of the hearing

it was suggested that if the salary paid by the Authority to a transferred officer rose beyond his former rate by reason of some general increase applicable to medical officers of the same grade, such enhancement should not be deemed an advantage for the purposes of subsection (2) of section 58. This view was based on subsection (3) of that section which I have set out above. At first glance this contention appears plausible; but it cannot be sustained on a closer examination of subsection (3) which reveals, quite clearly I think, that the increases of salary or other additional benefits to which it relates are confined to those which took place between the date mentioned in paragraph (a) of subsection (2), namely, March 21, 1946, and July 5, 1948, the day of transfer. The substantial increase in the plaintiff's remuneration which took place after he became a transferred officer is therefore an advantage to be considered in applying subsection (2) to his case.

If the views I have expressed thus far are correct, there can be no question of either paragraph 15 (retirement at 65) or condition No. 2 (three months' notice) being declared void and the other provisions of the plaintiff's contract remaining intact and effectual. As respects compliance with subsection (2) of section 58, the contract must stand or fall in its entirety; and that depends on a question of fact which this court cannot decide in these proceedings, namely, whether the terms, conditions and circumstances of the plaintiff's employment under the contract were, as a whole, less advantageous than those attaching to his employment as a Union officer. But while I must refrain from a finding as to that it will not, I hope, be out of place if (assuming, as I have up to this point, that the plaintiff is now entitled to normal benefits under the Superannuation Regulations) I add that I think he would be optimistic to take success for granted on that particular question. He had the choice of staying as he was or making a new contract and when he chose the latter he had his consultant status and a much better salary to set against the stipulations he now challenges.

But if the assumption I have made about the plaintiff's superannuation is wrong and if, as he contends, the result of his contract with the Authority may be that he has lost any claim he had to superannuation, then a very different state of affairs prevails and one which might well affect the applicability of subsection (2) of section 58. I therefore turn to consider the plaintiff's superannuation position after he had made his election under regulation

22 and had entered into his contract with the Authority on terms including paragraph 15 of Memorandum S/1/1949.

The plaintiff's proposition came to this, that the application of paragraph 15 would necessarily mean for him the loss of all superannuation benefits. This was said to affect the plaintiff's contractual position with the Authority in two ways. First of all it furnished, or at least augmented, the grounds for saying that paragraph 15, if not the whole contract, was in breach of subsection (2) of section 58 and therefore bad; and secondly, the argument proceeded, it meant that paragraph 15 was contrary to public policy, and bad for that reason also, because it amounted to a contracting out of superannuation rights by the plaintiff which it was in the public interest he should retain.

I need not comment on this two-fold argument at present. The immediate question is whether the proposition on which it was based is sound. Would the effect of paragraph 15 be to take away the plaintiff's superannuation rights? I find this a difficult question and have come to a conclusion upon it only after considerable hesitation. Before discussing it, however, I would refer to one point raised on behalf of the Authority in order to get it out of the way. This was that even if the plaintiff could not be superannuated under the Acts of 1865 and 1869, already mentioned, he was entitled to receive a similar annual allowance for loss of office under section 2(a) of the Union Officers (Ireland) Act, 1885. In my opinion this submission affords no solution of the problem and must be rejected. Section 2(a) only applies to loss of office caused by the abolition of the office lost and there is nothing in the facts or circumstances of this case which would bring it within reach of that situation. The plaintiff ceased to hold his office not because it had ceased to exist, but because his age had brought him within paragraph 15.

I come back, then, to the proposition under consideration. It is founded quite simply. Under the Acts of 1865 and 1869 incapacity by reason of permanent infirmity or old age was, as I observed earlier, a condition precedent to superannuation. But on the facts here that condition could not be fulfilled as the plaintiff was compelled, by the enforcement of paragraph 15, to retire before he was incapacitated and while yet able to perform his duties. Now if the effect of exercising his option under regulation 22 had been to leave the plaintiff's superannuation still regulated by the Acts of 1865 and 1869, as it had been while he was a Union officer,

it would, I think, be difficult to see an answer to this proposition. There is nothing in those statutes to justify even a hope of benefit in the event of an officer ceasing to be employed while in fact fit and able for his work. It is, however, clear that when the plaintiff ceased to be a union officer and became an officer of the Authority the Acts of 1865 and 1869 ceased to apply to him directly; and what he did when he exercised the option permitted by regulation 22 was to substitute for certain of what I may call the normal provisions of the Superannuation Regulations, other special provisions of those Regulations. Regulation 22 does not say that the consequence of electing thereunder will be to continue the application of the Acts of 1865 and 1869, *mutatis mutandis*. What it says is that Part I of the Regulations shall apply to the officer electing as if it "conferred upon him rights corresponding with those which "he would have enjoyed if he had remained subject to the enact- "ment or scheme previously applicable in his case."

This, of course, is a transitional provision meant to cover a variety of cases and to give transferred officers the opportunity of retaining benefits they might otherwise lose—as for example a reckoning in sixtieths instead of eightieths. But it is unfortunately vague and inadequate in its language. One thing, however, seems reasonably clear. The expression "corresponding with" was not intended to reproduce the identical scheme of the Acts of 1865 and 1869. That scheme, for instance, was discretionary on the part of the Guardians whereas regulation 22 refers to "rights" and, in my opinion, gives those opting the benefit of regulation 5 which speaks of an officer being "entitled. . . . to receive from the Ministry" a pension in certain events. If, then, the words "corresponding with" were not intended to re-create the previous situation with absolute exactitude, have they sufficient latitude to make the retirement on account of age of an opting officer a pensionable event irrespective of whether his age has produced an incapacitating infirmity? I have not found any express provision of the Act of 1948 or the Superannuation Regulations which gives an unequivocal answer to this question, and it therefore becomes necessary to ask whether the general intention or policy of these instruments is such as to afford a solution. In dealing with a subject-matter of the complexity and detail of that with which they are concerned, views regarding the general policy of the legislature or of those to whom it has delegated legislative power must be formed cautiously and with more in mind than the avoidance of hardship in individual cases. But I do not think I am leaving such considerations out of account when

I say that, in my opinion, the Act of 1948 and the Superannuation Regulations manifest one departure from the general policy of the Acts of 1865 and 1869 which is relevant to the present issue. There can be no doubt that since the earlier Acts were passed there has been a general trend in favour of fixing an age limit in respect of professional offices in the public service. Medical offices have certainly been included in this and there is, I think, a wide acceptance of the view that those who hold such offices should retire at an age fixed in the light of general experience rather than after the quality of their service has been impaired by failing powers. I think this trend is recognised and accepted both in the Act of 1948 and the Superannuation Regulations. Thus we find in section 60(2)(b)(ii) of the Act, in a provision for compensating a transferred officer who has been removed from or required to relinquish office, an express exception where the cause is misconduct or incapacity or "his having attained the age of sixty-five years;" while in the Regulations the expression "pensionable age" is defined in regulation 1(3) as the age of 60 for some officers and 65 for others, with power to the Ministry (in a limited range which would not include the plaintiff) to allow an extension in particular cases.

Reading regulation 22 against this background and the change in policy it depicts I cannot but feel that an interpretation of the words "corresponding with" which makes it impossible, for superannuation purposes, to equate retirement at 65 under the new regime with retirement on account of incapacity due to age, under the old, would be unduly narrow and out of keeping with what might reasonably be expected in the circumstances of this transition. I think the words "corresponding with" are accommodating and flexible enough to justify a broader view and my conclusion is that, on their true construction, they suffice to enable the plaintiff's retirement at 65 to be regarded as "corresponding with" the retirement because of age which would have qualified for a pension under the Acts of 1865 and 1869.

For these reasons I am against the proposition advanced by the plaintiff respecting his superannuation and I need not, therefore, proceed to consider the arguments which were built upon it. I may add that I would have preferred to decide this part of the case in proceedings to which the Ministry was a party, but we were not asked to make it a defendant and, in any event, its letter of March 12, 1953, to the plaintiff's solicitors, which is exhibited, states its view

clearly. It considers the plaintiff entitled to a pension which it computes at £966 per annum approximately on a superannuable remuneration of £1,813. But we have not the reasons which led the Ministry to this admission of liability and on that account I have endeavoured to reach my own conclusion without regard to this letter and the attitude it adopts.

I think I have now dealt with the main and subsidiary issues in this appeal sufficiently to enable me to return to a consideration of the questions submitted. I shall refer to them in the order in which they have already been set out.

Question 1: I would answer this "Yes" as Curran J. has done. The Authority clearly had power to make a contract of the kind mentioned in this question, though whether the contract actually made was in breach of section 58(2) of the Act of 1948 is another matter.

Question 2: Again agreeing with Curran J., I would answer this "Yes." It is, I think, impossible to hold on the true construction of the contract that paragraph 15 of Memorandum S/1/1949 did not form part of it.

Question 3: As matters stand I do not think it possible to answer this question categorically, or to say that the answer of Curran J. is necessarily wrong; but I would substitute for that answer the following as reflecting more accurately the present situation:

> "This depends on whether the terms, conditions and circum-
> "stances of the plaintiff's employment under the contract, when
> "viewed as a whole, were less advantageous to the plaintiff than
> "the terms, conditions and circumstances of his employment as
> "a Union medical officer on March 21, 1946. If they were, the
> "entire contract, including the term referred to, was in breach
> "of section 58(2) of the Act of 1948 and (subject to any special
> "defence that might be available to the Authority) invalid. If
> "they were not, the said term as well as the rest of the contract
> "was valid and enforceable. Whether the later terms, conditions
> "and circumstances are less advantageous than the former is a
> "matter of fact, but it must be determined on the basis that the
> "plaintiff would not in law lose his superannuation rights if
> "bound to retire at the age of 65."

Question 4: On the answers given this does not arise.

I would, accordingly, vary the order appealed from to the extent I have indicated. Apart from that I think the appeal fails and should be dismissed.

PORTER L.J.: I have had the advantage of reading the judgment which has just been delivered by the Lord Chief Justice, and generally speaking, I am in agreement with his conclusions and the considerations on which they are based, though I had entertained considerable doubt on the construction which the Lord Chief Justice has put on the much debated section 58(2) of the Act of 1948.

I agree that Curran J. was right in answering the first two questions in the affirmative and I would adopt the answer given by the Lord Chief Justice to the third question[1].

BLACK L.J.: By virtue of section 23 of the Health Services Act (Northern Ireland), 1948, the Belfast City Hospital was on July 5, 1948, the "appointed day" under the Act, transferred to the Northern Ireland Hospitals Authority. Under the provisions of section 58(1) of the Act all officers employed immediately before the appointed day solely or mainly at or for the purposes of the hospital thereupon became officers of the Authority. There appears to have been some doubt as to whether the plaintiff could be regarded as having been employed solely or mainly at or for the purposes of the hospital, but this difficulty was resolved by a direction given on April 21, 1950, by the Ministry of Health and Local Government under section 59(1) of the Act and it is conceded that the provisions of sections 58(1) and (2) of the Act apply to the plaintiff.

The subsection which has primarily to be considered for the purposes of the present appeal is section 58(2). This subsection provides that an officer of any hospital who by virtue of section 58(1) becomes an officer of the Authority shall be employed by the Authority on terms and conditions (including conditions as to superannuation benefits) and in circumstances not less advantageous than were applicable to his employment with that hospital on March 21, 1946.

This subsection was obviously introduced for the benefit and protection of transferred officers. I respectfully agree with the view expressed by the Lord Chief Justice that in considering whether the terms conditions and circumstances of a transferred officer's employment are as advantageous as those applicable to his employment with his hospital on March 21, 1946, one must have regard to the terms conditions and circumstances of his employment as a whole. The hospital services of the Province were to be reorganised under one controlling body. Some hospitals might have

[1] [This judgment was not revised by Porter L.J.—Editor.]

to be closed and their staffs transferred to other hospitals. Individual officers might have to be transferred to new duties. I cannot think that the Legislature could ever have intended that section 58(2) should be construed distributively so that every individual term condition and circumstance of an officer's service with the Authority would have to be at least as advantageous to him as the corresponding term condition or circumstance of his employment before his transfer. In my opinion what section 58(2) means is that the terms conditions and circumstances of an officer's employment with the authority when viewed as a whole must be not less advantageous to him than the terms conditions and circumstances of his pre-transfer employment.

I also agree with the Lord Chief Justice that section 58(3) applies only to increases of salary or other additional benefits accruing between March 21, 1946 and the "appointed day" (July 5, 1948) and has no application to any increase which may accrue subsequently.

On one point however I feel considerable difficulty in accepting the conclusions arrived at by the Lord Chief Justice regarding the effect of section 58(2). Its object, as I have already said, is to protect the position of transferred officers. A transferred officer automatically becomes on the appointed day an officer of the Authority without entering into any express contract with the Authority. Under his new employers section 58(2) provides that the terms and conditions and circumstances of his employment are not to be less advantageous than in his previous employment with the hospital. That clearly remains the position unless and until he enters into an express contract with the Authority. If the Authority desire him to enter into an express contract regulating his employment with them he is entitled to stand on his rights under section 58(2) and to decline to bind himself by such a contract if the terms and conditions of the proposed contract taken as a whole are less advantageous to him than those which he enjoyed prior to the transfer. But if notwithstanding this he freely and willingly enters into a new contract I do not think that the section should be read so as to prevent the officer and the Authority from entering into a contract upon such terms as may be mutually agreed between them. In my view section 58(2) will fully perform its function of safeguarding transferred officers if it enables them to refuse to enter into any arrangement which would have the effect of worsening their position. If, however, a transferred officer for some reason of his own wishes to enter into an arrangement with the Authority

which the courts would hold to be less advantageous to him I see no reason why he should be debarred from doing so provided, of course, that he enters into the arrangement freely and voluntarily and without being misled in any way as to the position. As I read section 58(2) it is merely a provision for the protection of certain individuals and in my view it was not intended to be anything more. Having given those individuals that protection I cannot think that Parliament intended to go farther and disable them from entering into such arrangements with the Authority as they might find convenient. The case appears to me to be essentially one to which the maxim "*Quilibet potest renunciare juri pro se introducto*" is applicable. I cannot discern any ground of public policy which would compel one to read section 58(2) as interfering with transferred officers' freedom of contract and as precluding such officers and the Authority from entering into such an arrangement as I have suggested. The possibility of an officer being willing to enter into an arrangement which the courts might consider less advantageous to him is not at all fanciful. A married man with a growing family employed at a hospital in a country town might be willing for the sake of his children's education or even for some preference of his wife's to accept a less highly paid position in Belfast. Or a man in Belfast with a liking for country life might wish to be transferred to a post in a country town although it might carry a lower salary. Or a man of means and of scientific tastes might wish to exchange the general clinical work of a hospital for work as a pathologist or as a biochemist although the remuneration was smaller. In my view section 58(2) while protecting transferred officers does not interfere with and was not intended, either on grounds of public policy or otherwise, to interfere with their freedom of contract, and accordingly if a transferred officer saw fit at any time subsequent to his transfer to enter into an express contract with the Authority I see no reason why such a contract should not be binding and enforceable even though it left him serving under conditions apparently less advantageous than those which he had enjoyed before his transfer.

Accordingly I am of opinion that it was competent for the plaintiff and the Authority to enter into the contract dated February 3, 1950, mentioned in the title to these proceedings and that (there being no suggestion of any reason why the contract should be set aside) the terms of that contract are binding on the parties. I would therefore answer Question 1 in the originating summons "Yes"

and would also answer Question 2 "Yes." With regard to Question 3 Curran J. answered this "Yes, but he must be paid a superannuation allowance or offered suitable employment by the Authority." In the events which have happened the question of what precisely may be the plaintiff's superannuation rights is one of difficulty. But on the best consideration which I can give the matter I agree as at present advised that the proper solution of this problem is that arrived at by the Lord Chief Justice and, subject of course to anything which the Ministry may put forward in subsequent proceedings, I would wish respectfully to express my concurrence with the part of the Lord Chief Justice's judgment dealing with this aspect of the case. On the view, however, which I have taken as to the validity of the contract between the plaintiff and the Authority this question of the plaintiff's superannuation has not the importance which it must bear if the conclusion arrived at by the Lord Chief Justice is accepted that the validity of the contract of February 3, 1950 between the plaintiff and the Authority depends upon whether or not the terms conditions and circumstances of the plaintiff's employment under that contract when viewed as a whole were less advantageous than those of his employment on March 21, 1946. Moreover, as the Lord Chief Justice has indicated, the matter of the plaintiff's superannuation is one between him and the Ministry who have not been made parties to the present proceedings. Accordingly if any question arises either with regard to the plaintiff's entitlement to superannuation or with regard to the amount of his superannuation it should not be finally decided except in proceedings in which the Ministry are represented and heard. I would therefore answer Question 3 in the Originating Summons simply "Yes," leaving the matter of superannuation to be resolved between the plaintiff and the Ministry. It is, however, satisfactory to know that the Ministry have apparently recognised the plaintiff's right to superannuation and are prepared to fix the amount at a sum substantially in excess of the salary of which the plaintiff was in enjoyment before he was transferred to the employment of the Authority.

Appeal dismissed: order of the court below varied in detail.

Solicitors for the appellant: *Cleaver, Fulton & Rankin.*

Solicitor for the Hospitals Authority: *K. J. Donaghy.*

S.M.M.

HAMILTON v. NIBLOCK[1]

Quarries — Breach of statutory duty — Duty to see that a sufficient supply of proper materials and appliances is provided — Whether duty absolute — Quarries Act (Northern Ireland), 1927 (17 & 18 Geo. 5, c. 19), Sched. 1, rule 1.

A workman employed in a quarry injured his back while assisting to lift a slab of granite on to a truck. In an action against the employer the workman claimed damages for breach of statutory duty, the duty relied on being that contained in rule 1 of the first schedule to the Quarries Act (Northern Ireland), 1927, which, under the title "Prevention of Dangerous Accidents in a Quarry," provides that "the owner....shall see that a sufficient supply of proper materials and appliances....for the purpose of ensuring the safety of the quarry and the persons employed, is always provided."

At the trial the following questions were left to the jury:

(1) Did the defendant fail to provide a reasonably safe plant for loading the granite slabs for conveyance....?

(2) Did the defendant fail to take reasonable care to provide a safe system of work for the loading of the granite slabs for conveyance....?

The jury answered both these questions in the negative and judgment was entered for the defendant. The plaintiff thereupon moved to set aside the verdict and judgment and for a new trial on the ground, inter alia, that the first question did not adequately raise the issue whether there had been a breach of the statutory duty relied upon.

Held, by the Court of Appeal (Porter and Black L.JJ. and Sheil J.), that the duty imposed by rule 1 of the first schedule to the Quarries Act (Northern Ireland), 1927, is an absolute duty to provide materials and appliances adequate to ensure the safety of persons employed in a quarry, and that the first question left to the jury did not adequately raise the issue of a breach of that duty.

Per Sheil J. *Quaere* whether the statutory provisions relied on were intended to cover an accident of the kind suffered by the plaintiff.

MOTION for an order for a new trial of an action tried by Lord MacDermott L.C.J. with a jury.

The facts of the case appear sufficiently in the headnote and in the judgment of Porter L.J.

Topping Q.C., *Jones Q.C.* and *Rowland* for the appellant.

Harrison Q.C. and *Blair* for the respondent.

Cur. adv. vult.

PORTER L.J.: The appellant was employed as a stone mason by the respondent in a granite quarry at Crowreagh between Rathfriland and Newry. Four men worked at the face of the quarry,

[1] In the Court of Appeal before Porter and Black L.JJ. and Sheil J.: June 1, 2; July 29, 1955.

and at the time of the accident seven, of whom the appellant was one, were employed in a dressing shed which was about 15 or 20 yards from the face of the quarry. The stone after being quarried was taken from the face by a crane to a bank where it was roughly hewn into shape. It was then put on a two wheeled truck—somewhat larger and heavier than the ordinary truck—and taken to the finishing shed. The appellant was injured when he was helping a fellow workman to manipulate a stone about 7 feet long and 3 or 4 hundredweight so that it would lie lengthways on the truck with one end protruding over the lip of the truck and the other end resting between the two handles. In order to get the stone on the truck it was necessary to lift up the handles and put the lip of the truck under the middle of the stone, then to pull down the handles so that the stone lay crosswise on the truck. In this position the stone being 7 feet long could not be taken into the dressing shed, so that appellant and his mate had to lift, roll or move it into a position in which it would lie lengthways on the truck. One end was therefore lifted and left projecting over the lip of the truck by over a foot and the stone was angled towards the handles. It was, however, impossible to slide the stone into position between the two handles because of the head of an iron bolt which projected about half an inch. The stone had therefore to be lifted over this projecting iron bolt and moved into position between the two handles, and it was when the appellant was lifting this end of the stone that the handles suddenly tilted or rose in the air, and the appellant, who was between the handles attempting to lift the stone and right the truck at the same time, felt a sudden jerk of pain in his back. According to the medical evidence he had sustained a lumbar disc lesion causing pain in the lumbar region, the left hip and down the whole of the left leg showing that the sciatic nerve was affected.

On cross examination he said: "Truck started to tip when I began "to lift standing between the handles....you had to stand between "the handles to keep truck from tipping—I'd been doing that type "of work loading as well as dressing for five years....Truck had "tipped before....never any difficulty before....mostly three on "job....one could hold handle down and prevent tipping....I "thought it suitable way of doing job to put foot on handle to "keep truck from tipping....I told Dr. Martin that truck tipped up."

The appellant's case was based on (a) breach of statutory duty and (b) breach of the common law duty of the respondent to supply

proper plant and appliances and to provide a proper system of work.

The statutory duty is set out in the first schedule of the Quarries Act (Northern Ireland), 1927, which is headed "Prevention of "Dangerous Accidents in a Quarry." Rule 1 is as follows:

"The owner, occupier, or agent shall see that a sufficient supply "of proper materials and appliances for the purpose of carrying "out the provisions of the Act and these rules and any regulations "made in pursuance of these rules, and for the purpose of ensuring "the safety of the quarry and the persons employed, is always "provided."

The learned trial judge left the following questions to the jury:

(1) Did the defendant fail to provide a reasonably safe plant for loading the granite slabs for conveyance from the bank to the shed?

(2) Did the defendant fail to take reasonable care to provide a safe system of work for the loading of the granite slabs for conveyance from the bank to the shed?

(3) If the answer to either (1) or (2) is "Yes", did the defendant's failure to provide safe plant for loading or a safe system of work (as the case may be) cause or contribute to the plaintiff's injury?

(4) Damages (less £220)?

The jury answered (1) and (2) in the negative and left (3) and (4) unanswered.

On these findings the learned trial judge directed that judgment be entered for the defendant with costs to be taxed in default of agreement.

Counsel for the appellant had submitted that the duty imposed by rule 1 of the first schedule of the Act of 1927 was an absolute duty and asked that the word "reasonably" in question 1 should be omitted, and that the question should be framed in the language of rule 1 of the schedule, and that a specific question should be put with regard to the truck.

The appellant now moves to set aside the verdict and judgment and for a new trial on the ground that the verdict was against the evidence and the weight of the evidence, and that the first question did not properly or adequately raise the issue of the alleged breach of statutory duty.

The appellant had suggested that the stone could have been laid in position on the truck with a crane, and he said that there had mostly been three men on that job, and the consulting engineer, Glendinning, said that a four-wheeled truck would have been better, or that the stone could have been loaded by a crane on to the truck or that bars could have been used to load it. The engineer also said he had never seen a mobile crane in a quarry like this one. The accident, however, had occurred not in conveying the stone to the shed, but in the loading of it on to the truck, and with regard to this the appellant in reply to a question put to him by the learned trial judge replied: "You could not do this we were doing any "different way unless you put it on with a crane." No question was asked nor was any explanation given why the fixed crane which lifted the stone from the quarry face to the bank could not have lifted it from the bank and laid it lengthways on the truck. The respondent had stated in cross-examination that it would be possible to arrange matters so that one of the two cranes could put slabs on the truck, but he added that he did not consider that was necessary when the stone was a seven foot slab. Apparently the use of the crane was possible, but the respondent did not consider it necessary for a seven foot slab. It seems to me that if the crane had been used to lift the slab and place it on the truck, that would have been a simpler and less difficult operation, and the tilting of the truck would have been avoided.

The entire argument before us was devoted to the first question, the contention of appellant's counsel being that the form and language of the question did not properly or adequately raise the issue of breach of statutory duty as pleaded in the statement of claim. He had asked that the question should be framed in the language of rule 1 of the first schedule. The learned trial judge in his note says that he read the material parts of rule 1 to the jury and it seemed to him that to echo the words of rule 1 would be likely to confuse the jury and that he thought that the terms of the question raised the issue sufficiently having regard to the facts—provided he was right in holding, as he did, that rule 1 did not impose an absolute duty and was not breached merely because the plant provided had not sufficed to prevent the occurrence of an accident causing injury to the persons employed. The statutory obligation imposed upon the respondent by rule 1 is to see that a sufficient supply of proper appliances is provided for the purpose of ensuring the safety of the persons employed.

Now by the common law an employer is bound "to take reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.": *Smith v. Baker*, per Lord Herschell[1].

Appliances are not proper if they are not reasonably safe, but I do not think that the provision of a reasonably safe plant would satisfy the specific requirements of rule 1. Indeed it would be almost incredible that in a schedule framed for the "Prevention of Dangerous Accidents in a Quarry" the first paragraph should be nothing more than a reiteration of the common law duty to provide reasonably safe plant.

The word "see" imports an obligation strictissimi juris which is quite different from the ordinary common law duty to take reasonable care. Moreover, there is an entire absence of qualifying words. The appliances must be proper and the supply sufficient, not reasonably proper nor reasonably sufficient, but proper and sufficient for the purpose of ensuring the safety of persons employed, and the purpose is not limited or qualified by the addition of such phrases as "if reasonably practicable" or "so far as possible." The words "reasonably safe plant" in the first question appear to set up a much lower standard of duty and also of safety than the standard prescribed by the statutory regulation, and in particular attribute little or no meaning or force to the words "for the *purpose* of "*ensuring the safety* of....the persons employed."

The words "sufficient" and "proper" mean sufficient and proper to effectuate that purpose, and if it were shown that the accident was caused by the failure of the respondent to provide a sufficient supply of proper appliances so as to ensure the safety of the workmen, that would justify a verdict for the appellant, and it would be of no avail for the respondent to plead that he had fulfilled the common law duty of taking care to provide a reasonably safe plant.

A few illustrations of regulations containing similar words will suffice. In *Dixon v. Great Western Railway Co.*,[2] the English Court of Appeal decided that the Company was liable for not maintaining *sufficient* fences. By section 68 of the Railway Clauses Act, 1845, the Company was bound to "make and at all times maintain.... "sufficient fences for separating the land taken for the use of the "railway from the adjoining lands not taken, and protecting the

[1] [1891] A.C. 325, 362

[2] [1897] 1 Q.B. 300

"cattle of the owners or occupiers thereof from straying thereout." Lord Esher M.R. said that the obligation on the Company was to make and maintain fences which would prevent the cattle of people who had lands adjoining the railway from straying[1]. Lopes L.J. held that the section created an absolute and permanent obligation to make and maintain a sufficient fence[2]. Rigby L.J., referring to the permanency of the obligation, said it was an obligation *to do what was necessary* for keeping cattle from the dangerous viaduct of the railway line.[3]

In *Watkins v. Naval Colliery Co.* (1897) *Ltd.*,[4] the House of Lords considered the meaning of the words *proper apparatus* which occur in section 16(1)(c) of the Coal Mines Regulation Act, 1887, which provides that proper apparatus for raising and lowering persons at each shaft or outlet shall be kept on the works belonging to the mine; and by rule 30 of section 49 "there shall be attached to every "machine worked by steam, water, or mechanical power, and used "for lowering or raising persons, an adequate break or breaks." It was held that the section imposed an absolute obligation upon the owners to provide proper apparatus. Viscount Haldane L.C. said[5] "The real question is whether it" (i.e. the section) "imposes "an absolute obligation, to the allegation of breach of which it is "no answer that the colliery company have not been personally "negligent. I am of opinion that this is the true view, and that no "question of negligence or of the doctrine of common employment "is relevant. The statute appears to me to impose a condition with- "out qualification with which the colliery owners are bound to "comply." Lord Atkinson, holding that the obligation was absolute, said[6] "If any meaning is to be given to words, an apparatus proper "for any particular work must mean an apparatus adequate to do "that work."

In the Shipbuilding Regulations, 1931, made under section 79 of the Factory and Workshops Act, 1901, there are references to the safety of the workmen in terms similar to rule 1 of the quarry regulations. Regulation 11b is as follows: "All staging shall be "securely constructed of sound and substantial material and shall "be maintained in such condition *as to ensure the safety of all persons* "*employed*." The latter part of this regulation was considered in *Smith v. Cammell Laird & Co. Ltd.*,[7] and it was held that the obliga-

1 [1897] 1 Q.B. 303.
2 ibid. 304.
3 ibid. 306.
4 [1912] A.C. 693.
5 ibid. 702.
6 ibid. 707.
7 [1940] A.C. 242.

tion was absolute and was in no way cut down by the further requirement that regular inspections should be made.

Similar words occur in part IV of the regulations dealing with precautions against injury from falling materials. Regulation 33 is as follows: "Where any staging has to be dismantled and also in "all cases where materials or articles have to be raised to or lowered "from a height, *adequate precautions shall be taken to ensure the "safety of all persons employed.*"

The adequacy of the precautions is not to be determined by what a jury might consider reasonable, but by considering whether the precautions are adequate or sufficient to ensure the safety of the persons employed.

In my opinion rule 1 of the regulations does impose an absolute duty upon the respondent. The first question does not raise nor was it intended to raise the issue of a breach of this absolute duty, nor were the full requirements of the statutory duty put before the jury. The appellant is entitled to have this issue put to the jury and there must therefore be a new trial.[1]

BLACK L.J.: I confess that I have not found this case an easy one. It arises out of an accident alleged to have been sustained by the plaintiff when engaged with another man in loading a large block of stone on a truck in the defendant's quarry where the plaintiff was employed. The action was founded on (a) alleged negligence on the part of the defendant and his employees and (b) an alleged breach by the defendant of his obligations under rule 1 of the rules set out in the first schedule to the Quarries Act (Northern Ireland), 1927. In view of what a quarry is deemed to comprise by virtue of the provisions of section 29(2) of the Act of 1927 there can be no doubt but that the place in which the plaintiff was engaged working at the time of the alleged accident was a quarry within the meaning of the Act. Nor was it disputed at the trial that the operation at which the plaintiff was engaged would entitle him to the protection sought to be afforded by rule 1 in the first schedule to the Act. No objection, moreover, was taken by the defendant to a question being left to the jury on the issue of breach of the statutory duty imposed by rule 1 and accordingly I take it to be conceded that there was evidence on this issue proper to be submitted to the jury.

[1] [This judgment was not revised by Porter L.J. —Editor.]

The learned Lord Chief Justice left separate questions to the jury designed to obtain their verdict on the two issues of negligence and breach of statutory duty. The jury by their answer to the question on the issue of negligence found that issue in favour of the defendant and the jury's decision on this point was not challenged in the argument before this court. The jury also answered in favour of the defendant the question submitted to them by the Lord Chief Justice to try the issue of breach of statutory duty. The contention of the plaintiff on the appeal was that this question was not framed so as properly or adequately to raise or try that issue.

Rule 1 of the rules contained in the first schedule of the Act of 1927 which lays down the statutory duty on which the plaintiff relies is one of a group of three rules headed "Prevention of Danger-"ous Accidents in a Quarry." Leaving out words not material for the present case the rule provides "The owner, occupier, or agent "shall see that a sufficient supply of proper appliances for the pur-"pose of ensuring the safety of the persons employed is always "provided." Adopting the paraphrase of similar words by Lord Atkinson in the passage which Porter L.J. has cited from *Watkins v. Naval Colliery Co.* (1897) *Ltd.*[1] this rule means that appliances adequate for the purpose of ensuring the safety of the workers must be provided. In order to obtain the jury's decision on the issue of statutory liability counsel for the plaintiff asked that the question on the issue should be framed following the language of rule 1. The Lord Chief Justice, however, thought that a question echoing the words of rule 1 would be likely to confuse the jury, and for the purpose of obtaining their decision on the issue of statutory liability he left the following question:

"Did the defendant fail to provide a reasonably safe plant for "loading the granite slabs for conveyance from the bank to the "shed?"

In his report of the trial, however, the Lord Chief Justice states that his recollection is that he read the material parts of rule 1 to the jury.

For my own part I find difficulty in thinking that a question echoing the words of rule 1 would be calculated to confuse a Belfast jury. And the question submitted to the jury by the Lord Chief Justice does not seem to me to pose exactly the same issue as rule 1. The rule directs that appliances for the purpose of ensuring the safety of the workers must be provided, whereas the Lord Chief

[1] [1912] A.C. 693, 707.

Justice's question would appear to be pointed to an issue whether the appliances provided were themselves safe, rather than to whether they were appliances adequate for ensuring safety. In the circumstances of the present case there may perhaps not be much in this, although indeed the point was made for the plaintiff at the trial that some mechanical contrivance ought to have been provided for loading the blocks of stone on to the truck. The main difficulty which I find, however, is in the words "reasonably safe." Like Parker J. in *Sheppey v. Matthew T. Shaw & Co. Ltd.*[1] I feel great hesitation about this phrase "reasonably safe." The word "reasonably" is not in the rule, and when prefixed to the word "safe" it seems to me to introduce an element of vagueness which would not have arisen if the question to the jury had been framed in the words of the rule prescribing the duty. What exactly does "reasonably safe" mean? In *Adsett v. K. & L. Steelfounders & Engineers Ltd.*[2] Parker J. discussing section 47(1) of the Factories Act, 1937, remarked that "practicable" was presumably something stricter than "reasonably practicable." So "reasonably safe" must I think be taken to be something less strict than "safe." I feel that to a jury of laymen "reasonably safe" would be apt to be taken to mean simply something which was pretty safe without being necessarily quite safe—something say 95 or 97 or 99 per cent. safe. An appliance might conceivably be held by a jury to be reasonably safe according to this standard without being adequate for the purpose of ensuring the safety of the workers as required by the rule. If this is the case it is possible that the jury may have answered the question submitted by the Lord Chief Justice without addressing themselves to or deciding the real issue of statutory liability, namely, whether the defendant had failed to carry out the obligation imposed on him by rule 1. Accordingly I agree that there should be a new trial of the issue of breach of statutory duty.

SHEIL J.: I agree that there should be a new trial of the issue of alleged breach of statutory duty.

Speaking for myself I have some doubt as to whether rule 1 of the first schedule of the Quarries Act was applicable at all. The rule is designed for the "prevention of dangerous accidents in a quarry." Was this a *dangerous* accident? Was it an accident of a type or kind peculiar to a quarry, which occurred not merely while but because the plaintiff was working in a quarry, or was it an accident, dangerous

[1] (1952) 68 T.L.R. Pt. 1. 1272. [2] [1953] 1 All E.R. 97.

or otherwise, which with a like truck and a like heavy and unwieldy load could have happened just as readily in a warehouse or on a farm? I confess to difficulty in answering my own query in favour of the plaintiff.

But once it was conceded that the rule did apply it seems to me that there was an absolute duty to provide a sufficiency of proper materials and appliances for the purposes mentioned in the rule and that the introduction of the word "reasonably" into question 1 to the jury, watered down that duty.

Appeal allowed.
New trial ordered.

Solicitors for the appellant: *D. & E. Fisher.*

Solicitors for the respondent: *C. & H. Jefferson.*

J.P.

GLASS v. GLASS[1]

Practice—Procedure—Petition for divorce—No appearance entered—Interlocutory summons—Summons not served on respondent—Order made on foot of summons—Whether "proceeding had"—R.S.C. Or. 64, r. 15; Or. 70, rr. 9, 62, 78.

On December 14, 1953, a petition for divorce was presented and served personally on the respondent who did not enter an appearance. On October 18, 1955, application was made to the Registrar of the Queen's Bench Division (Matrimonial) for a certificate that the pleadings were in order, and the question was raised whether this was a cause or matter in which there had been no proceeding for one year from the last proceeding had within Order 64, rule 15, so as to necessitate a month's notice to the other party of intention to proceed.

On December 7, 1954, a summons had been taken out on behalf of the petitioner for an order permitting the petitioner's evidence to be received on affidavit as she was out of the jurisdiction. On January 14, 1955, an order was made on this summons, as amended, that the petitioner's evidence should be taken abroad before an examiner. The summons was, in accordance with established practice, issued as a *pro forma* summons and addressed to all parties concerned: such a summons is not served otherwise than by filing in conformity with the rules.

Held, that the summons of December 7, 1954, was "a proceeding had" within Order 64, rule 15, and no notice of intention to proceed need be served.

Semble, that in any event an order made on foot of a summons and acted upon without objection would constitute "a proceeding had" within Order 64, rule 15, notwithstanding that the summons had not been duly served.

PRELIMINARY POINT raised in a petition for divorce on the ground of desertion.

A wife presented a petition for divorce on December 14, 1953, and it was subsequently served personally on the respondent, who did not enter an appearance thereto. On December 7, 1954, application was made by summons on behalf of the petitioner for an order permitting her evidence to be received on affidavit on the ground that she was overseas. Before issuing the summons the petitioner's solicitor consulted the Registrar of the Queen's Bench Division (Matrimonial) as to the form which the summons should take, and as to how it should be served, and he was told that the practice in cases where no appearance had been entered was to issue a *pro forma* summons addressed to "all parties concerned" and that such summonses were not served otherwise than by filing. The petitioner's solicitor accordingly adopted this procedure in the present case.

[1] In the Queen's Bench Division (Matrimonial) before Lord MacDermott L.C.J.: Jan. 27, 1956.

On January 14, 1955, Porter L.J. made an order amending the terms of the summons and directing that the petitioner's evidence be taken before an examiner appointed by the court and that her deposition when taken should be transmitted to the registrar. This was duly done, and on October 18, 1955, application was made to the registrar for a certificate that the pleadings were in order. The question was then raised whether a notice of intention to proceed was necessary in the circumstances, but a certificate was given subject to the condition that this question should be determined by the judge at the hearing.

Hutton for the petitioner. Notice of intention to proceed is not necessary in the present circumstances. The summons of December 7, 1954, was a necessary step, and was properly before the court. It therefore was "a proceeding had" for the purposes of Order 65, rule 14. The summons was a *pro forma* summons and the Rules did not require it to be served personally. In any event, even if personal service might otherwise have been required, the information given to the petitioner's solicitor could be regarded as a direction dispensing with personal service within Order 70, rule 9. Furthermore, the fact that an order has been made by the court on foot of the summons and acted upon without objection is sufficient to cure any defect there might have been in the service of the summons.

LORD MACDERMOTT L.C.J.: I will deal with the preliminary point raised in this case now, since it can have no bearing on the hearing of the petition itself, and no light could be thrown upon it by the evidence to be adduced in support of the petition. The petition was presented on December 14, 1953, and no appearance has been entered to it by or on behalf of the respondent. By a summons dated December 7, 1954, the court was moved on behalf of the petitioner for an order permitting her evidence to be received upon affidavit, on the ground that she was out of the jurisdiction. This application was at first adjourned, but subsequently, on January 14, 1955, an order was made by Porter L.J. amending the terms of the summons and directing that the petitioner's evidence should be taken in Singapore by an examiner appointed by the court, and further ordering that the deposition of the petitioner should be authenticated by the examiner and transmitted to the registrar of this court. The petitioner was, accordingly, examined on October 6, 1955, and her deposition has been transmitted to this court in accordance with the order.

The question now is whether the summons, the order made on January 14, 1955, or the proceedings before the examiner, can be regarded as a "proceeding had" for the purposes of Order 64, rule 15. If so, there is no reason why the court should not proceed to hear the petition; but if not, then the provisions of Order 64, rule 15, would necessitate the service of a notice of intention to proceed upon the respondent before the petition could be heard.

At this point I must refer to a matter to which Mr. Hutton has, very properly, drawn the attention of the court, and that is the fact that the summons dated December 7, 1954, was never actually served on the respondent. Order 70, rule 9(1) provides that the service of any document on a party who has not entered an appearance shall be personal service unless otherwise directed, but it seems to me that before that rule can affect the present case, it must be shown that the summons of December 7, 1954, was one which ought to have been served in some way. I may say that if I were to come to the conclusion that this summons should have been served, I would not be prepared to hold that the information given by the registrar to the petitioner's solicitor in this case constituted a direction dispensing with personal service within rule 9(1). The registrar was not, on that occasion, purporting to direct what should be done; he was only giving what assistance he could to a practitioner as to the prevailing practice.

I cannot, however, find anything requiring service of the summons in this case. The only provision which might have that effect is Order 70, rule 62, which states that "the name of the cause or "matter and of the person taking out a summons shall be endorsed "thereon and the summons shall be served on the party to whom "it is addressed or on his solicitor one clear day at least before the "summons is returnable."

This rule is not very happily phrased. It is expressed in wide terms but, on the other hand, when read literally, it can scarcely be applied in the present circumstances, because this summons being in the form appropriate for a *pro forma* summons, was not addressed to any particular person. Apart from that, however, it seems to me that rule 62 is directed to specifying matters which a summons should contain, and the time which is to elapse between service, where service is requisite, and the date upon which the summons is returnable, rather than to providing that every summons must be served. No doubt there are summonses which have

to be served on a party even though he has not entered an appearance, but I do not regard the kind of summons with which I am now dealing as coming within that class. The practice which has been followed hitherto and which corresponds to the practice in England whereby such a summons is not served, is in my opinion in accord with the Rules, and should not be disturbed. Without making any attempt to define the borderline between summonses which should, and those which need not, be served, I hold that the summons in this case did not require to be served.

I therefore consider that the order made by Porter L.J. was regularly made; but even if that were not so, I think there is much force in Mr. Hutton's second argument that it cannot be said that the order was not a "proceeding" as it still stands and has been taken up and acted upon, and I would be prepared to hold, if it were necessary, that it, and also the proceedings thereunder before the examiner, were proceedings "had" for the purpose of Order 64, rule 15.

For these reasons, it seems to me that the petition may now be heard without the service of any notice of intention to proceed.

His Lordship proceeded to hear the petition and granted a decree nisi.

Solicitors for the petitioner: *Skelton, McMaster & Co.*

J.P.

CAIRNS v. PRUDENTIAL ASSURANCE CO. LTD.[1]

Business tenancy —Application for renewal—Four years' occupation as "tenant"—Different tenancies during period—Business Tenancies (Temporary Provisions) Act (Northern Ireland), 1952 (15 & 16 Geo. 6 and 1 Eliz. 2, c. 2), s. 2(1).

Section 2(1) of the Business Tenancies (Temporary Provisions) Act (Northern Ireland), 1952, which provides that a tenant who has been in occupation of a business tenement for not less than four years immediately before the passing of the Act may apply for a renewal of his tenancy, does not require that the four years occupation should necessarily have been under the same tenancy agreement, and an applicant may avail himself of this section notwithstanding that he held different tenancies during the specified period.

STATUTORY APPEAL from a decision of the Recorder of Belfast.

In 1929 Thomas Cairns and Joseph O'Hara became partners with Frank Kerr who was in practice as a solicitor at premises in 3 Wellington Place, Belfast. A new lease was then obtained in the name of the partnership for a term of ten years. In 1939 a renewal of the lease was obtained for a further term of ten years, and in 1949 another renewal for a term of five years. In all these leases there was a provision that if the landlords required the premises for their own occupation during the term they could obtain such occupation on six months' notice.

In 1953 the partnership was dissolved, whereupon Thomas Cairns and his son, Harry I. Cairns, asked the landlords for a new lease. The landlords agreed to grant a new lease for a term of ten years provided that the old lease, under which there was a period of eighteen months still to run, was surrendered by all the members of the original partnership. The surrender having been obtained, a new lease was granted, subject, as before, to the condition that the landlords could obtain possession if they required it for their own occupation on six months' notice. In September, 1954, the tenants received six months' notice terminating the lease. After investigating the possibility of obtaining alternative premises they applied to the Recorder's Court for a renewal of their tenancy.

The Recorder held that Thomas Cairns was a person who had been entitled to the occupation of the premises for the relevant period and that he had a right to apply for a renewal of the tenancy. The landlords appealed to the Supreme Court under the provisions

[1] In the Supreme Court of Judicature before Curran J. sitting to hear a statutory appeal: July 1, Dec. 12, 1955.

of section 9(3) of the Business Tenancies (Temporary Provisions) Act (Northern Ireland), 1952.

McSparran Q.C. and *McLean* for the tenants.

Lowry for the landlords.

Cur. adv. vult.

CURRAN J.: The only question I have been asked to determine is whether Thomas H. Cairns is a person who is entitled to apply for a renewal of his tenancy in the premises situate at rooms 1-7 first and second floors, 3 Wellington Place, Belfast, under section 2(1) of the Business Tenancies (Temporary Provisions) Act (Northern Ireland), 1952.

The learned Recorder delivered a written judgment in which he stated: "It is clear that the subsection only applies if the tenancy, "the subject of the claim for renewal, was in existence at the relevant "date, viz., February 11, 1948." He then finds that Thomas H. Cairns "was a person entitled to the occupation of the premises "and has the right to apply for a renewal of his tenancy." I have difficulty in reconciling these two findings.

My difficulty arises for this reason: no doubt Thomas H. Cairns was entitled to occupy the premises from a date prior to February 11, 1948, but the tenancy of which he seeks renewal commenced on May 1, 1953. His prior occupation was under tenancies that had ceased before May 1, 1953. Accordingly, he is seeking the renewal of a tenancy that was not in existence at the relevant date, viz., February 11, 1948.

It would appear that the basis for the learned Recorder's decision was that Thomas H. Cairns was, at the relevant date, entitled to the *occupation* of the premises. But, according to the learned Recorder himself, it is the *tenancy* that is sought to be renewed that must have been in existence at the relevant date to comply with section 2(1) of the Act.

In my opinion that subsection requires (a) that the applicant for renewal must be a *tenant* within the meaning of section 11(1) of the Act, and (b) that he must have been in occupation for not less than four years immediately preceding the passing of the Act, as a tenant. I do not read the subsection as requiring that the four years occupation must have been under the same tenancy agreement. All that is required is that the applicant must have been in occupation for that period as a tenant. Accordingly, in my opinion Thomas H. Cairns satisfied this requirement notwithstanding the

fact that he had different tenancies during the specified period. Mr. Lowry contends that as "tenant," in the Act, is defined in section 11(1) as "the" person for the time being entitled to occupation, you cannot exclude one of two partners; that either they must both be entitled to apply for a renewal, or such application must fail. Mr. Lowry further contends that the provisions of section 6(1) can only have reference to the renewal of the existing tenancy namely, in the present case, the tenancy of Thomas H. Cairns and Harry I. Cairns and that such tenancy cannot be renewed by reason of the fact that Harry I. Cairns is not entitled to apply for renewal.

It is conceded that Thomas H. Cairns has been a tenant in occupation for the requisite period of four years though he has never been the sole tenant. If his tenancy is otherwise renewable under the Act I see no reason why the provisions of section 6(1) should not be effective in respect of such tenancy. Accordingly, in my opinion he is a tenant who is entitled to apply for renewal of his tenancy under section 2(1) of the Act unless excluded by the meaning given to "tenant" by section 11(1) of the Act.

Mr. Lowry has relied upon the wording in the first part of the definition, namely, "the person for the time being entitled to the "occupation of a tenement." This, of course, has reference to a tenant who makes his claim for renewal before his tenancy has terminated, as in the present case. If the notice to quit had terminated the tenancy prior to the application for renewal being made, the remaining portion of the definition of "tenant" in section 11(1) would have been applicable, namely, "and where the "context so admits, includes a person who has ceased to be entitled "to such occupation by reason of the termination of his tenancy." In this event I apprehend that Thomas H. Cairns would have been a tenant, as so defined, whereas Harry I. Cairns would not have come within the definition, because the context, namely, the provisions of section 2(1), would not have so admitted. Accordingly, in my opinion Thomas H. Cairns would, at that stage, have been the only tenant, within the meaning of the Act, and would have been entitled to apply for renewal. If I am right in this view, it strengthens the opinion I have formed that the use of the word "the," in the definition of "tenant" in section 11 of the Act, has not the significance suggested by Mr. Lowry. In my opinion the first part of the definition must be read as including "a" person

just as the latter portion of the definition expressly includes "a" person. Accordingly, I affirm the decision of the learned Recorder that Thomas H. Cairns is a person who is entitled to apply for a renewal of his tenancy.

Appeal dismissed.

Solicitor for the tenants: *J. G. Doran.*

Solicitors for the landlords: *N. & F. Tughan & Walmsley.*

S.M.M.

McCLELLAND v. NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD[1]

Health services—Contract of employment—"Permanent post"—Dismissal on due notice.

In August, 1948, the Northern Ireland General Health Services Board invited applications for clerical posts by an advertisement which stated that "subject to a probationary period the appointments will be permanent and pensionable." In response to the advertisement the appellant applied for and was appointed to a post, and a month after taking up her duties she was handed a memorandum of the terms and conditions of service approved by the Board. This memorandum referred to "permanent staff" and contained a clause providing for the dismissal of officers for gross misconduct or inefficiency, but contained no provisions for dismissal in other circumstances. It did, however, contain a provision that "permanent officers" who wished to terminate their employment must give one month's notice. In 1953 the Board gave the appellant six months' notice of dismissal to expire at the end of a year of service. There was no suggestion of misconduct or inefficiency on the part of the appellant, and the reason for the dismissal furnished by the Board was redundancy of staff.

On an originating summons raising the question whether the appellant's service had been validly terminated Curran J. held that the appellant was a civil servant and, as such, held office during the pleasure of the Crown. On appeal it was conceded by both parties that the appellant was not a civil servant.

Held, by the Court of Appeal (Lord MacDermott L.C.J. and Black L.J., Porter L.J. dissenting), (i) that in the context of this contract "permanent" employment was to be contrasted with employment which was transient or linked to some particular occasion or the performance of some special task, and did not connote that the employment would endure for life; (ii) that six months' notice was proper notice and that accordingly the appellant's employment had been validly terminated.

Per Lord MacDermott L.C.J.: Having regard to the provisions of the Health Services Act (Northern Ireland), 1948, and to the constitution of the Health Services Board as a statutory corporation it is clear that the service of the Board is not the service of the Crown.

APPEAL from an order of Curran J. on an originating summons.

On June 21, 1948, the newly formed Northern Ireland General Health Services Board published an advertisement in the press inviting applications for posts on the staff of the Board. This advertisement contained the statement: "Subject to a probationary period, "appointments will be permanent and pensionable."

Relying upon the terms and conditions of this advertisement the appellant, who was at that time a clerk in the employment of the

[1] In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.: Nov. 1, 2, 1955; Mar. 29, 1956.

Northern Ireland Hospitals Authority, applied for an appointment as senior clerk on the staff of the Board. Having been short listed for the appointment she was interviewed on July 27, 1948, and on July 29, 1948, she received a letter from the secretary of the Board stating that the Board had selected her for an appointment as senior clerk on the Board's staff at the salary of £300.

She replied by letter accepting the appointment, and then resigned her position in the Northern Ireland Hospitals Authority. On August 16, 1948, she commenced work as a senior clerk on the staff of the dental estimates branch of the Board.

By memorandum dated August 18, 1948, the Finance and General Purposes Committee of the Board agreed to recommend for the approval of the Board the staffing proposals and the terms and conditions of service for the staff set out in the schedule to the memorandum, and on August 25, 1948, the Board adopted these recommendations, and by letter of September 3, 1948, the Board was notified that the Ministry had given its approval. These the appellant accepted as the terms of service upon which she was employed in her post of senior clerk in the staff. She stated in her affidavit: "I accepted them because I realized that all details of "my employment were not contained in the newspaper advertise- "ment above referred to and I was fully prepared to accept any "terms of service which were not inconsistent with the basic terms "and conditions upon which I offered myself for, and accepted the "said post which were, so far as I was concerned, the salary and "security of tenure."

The memorandum set out the grades, numbers and remuneration of the Board's staff, and there followed a paragraph which stated: "The above establishment shows the basic minimum permanent "staff required and will in some cases be supplemented by tem- "porary employees until the services are operating satisfactorily. "In the light of experience it may be necessary to increase the "number." Clause 12 was entitled "Dismissal and Reduction in "Rank and termination of employment otherwise." Its terms were: "The Board may dismiss any officer for gross misconduct and may "dismiss any officer who is proved to their satisfaction to be in- "efficient and unfit to merit continued employment. Except where "an officer has been guilty of gross misconduct the Board shall "give at least one month's notice of their intention to exercise "their powers of dismissal under this rule. As an alternative to "dismissal, the Board may order the reduction in rank of an officer

"who is found by them to be unfit to discharge the duties of the "grade in which he has been employed. One month's notice shall "be given by all permanent officers who wish to terminate their "employment with the Board."

On February 16, 1949, having completed the probationary period to the satisfaction of the Board, the appellant was confirmed in her post as senior clerk.

On August 14, 1950, the Ministry signified its approval of a new term and condition of service for the employment of women to be added at the end of Paragraph 12 of Part V of the original terms and conditions, viz., "Female officers will on marriage be required "to tender their resignations to the Board."

The appellant was married on March 9, 1951, and informed the Board that she wished her name to be changed from Steele to McClelland. She did not tender her resignation. In her affidavit she stated: "I did not at any time accept the new term or condition "but maintained and still maintain that it was not nor is it com- "petent for the Northern Ireland General Health Services Board "to alter the terms and conditions of my employment with the "Board, being my contract with the said Board, without my consent."

On January 27, 1953, the establishment officer of the Board wrote to the appellant drawing her attention to the new term and to this she replied by letter dated February 16, 1953, that this term was not included in the original terms and conditions.

By a letter of May 29, 1953, formal notice was given to the appellant terminating her employment with the Board on June 30, 1953. The only reason for the dismissal is contained in the last paragraph of the letter which says: "The Board regret the present "necessity to dispense with redundant staff and wish to thank them "for service given."

The appellant, by letter dated June 15, 1953, protested that the new term was not retrospective and pointed out that dismissal on June 30, 1953, would debar her from qualifying for a pension upon completion of 10 years service by about a period of two months and asked that she might be allowed to remain in her post until such time as her superannuation rights would be assured. In pursuance of this request the notice of dismissal dated May 29 was withdrawn and she was allowed to retain her position until December 31, 1953.

Some married women on the staff establishment had refused to accept the new term as applicable to themselves. The Board, therefore, acting on legal advice, determined to serve six months' notice of dismissal on each married woman on their establishment. Accordingly, notice dated February 15, 1954, was given to the appellant that her employment with the Board would terminate on August 16, 1954.

By an arrangement between the parties the appellant's employment with the Board had been continued on a day to day basis, without prejudice, however, to the rights of each party pending the determination by the court of the matters in dispute.

On March 15, 1954, the appellant as plaintiff took out an originating summons against the Board as defendants. The summons asked the opinion of the court on three questions, but of these the first two were held by Curran J. not to call for an answer, and the third question asked: "Whether, in the events which have happened, "the engagement of the plaintiff as a senior clerk with the defendant "has been validly terminated." This question was answered by Curran J. in the affirmative on the ground that the plaintiff was a civil servant and, as such, held office only during the pleasure of the Crown. The plaintiff thereupon appealed to the Court of Appeal.

Jones Q.C. and *Shaw* for the appellant.

Patton Q.C. and *MacDermott* for the respondent Board.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. summarised the facts briefly and continued: Before this court counsel for both parties submitted that the basis of the decision in the court below was wrong as the service of the Board was not the service of the Crown. Having regard to the provisions of the Act of 1948 and to the constitution of the Board as a statutory corporation established thereunder, I am of opinion that this submission of counsel was right and that the learned judge was in error in treating the appellant as a civil servant in the service of the Crown. This left the true construction of the contract respecting the right of dismissal as the principal matter in dispute, and the arguments on the appeal were directed accordingly. No question arises as to the appellant's conduct and efficiency. It is the Board's right to terminate the employment as they have sought to do that is in issue.

The appellant's employment was not the subject of a formal contract, and it became apparent soon after the hearing before us

had started that the parties were not in agreement as to which of the documents exhibited constituted the document they wished to have construed. In this unfortunate state of affairs counsel on either side joined in asking the court to determine this difference and to decide what in fact were the material contractual documents. To assist the parties in avoiding further delay and expense the court acceded to this request. It must, however, be made plain that this concession is not to be regarded as a precedent. An originating summons is not a suitable procedure for settling what a contract is as a preliminary to deciding what it means, and it is clear that rule 12 of Order 55 was never intended to provide for a situation of that sort.

To understand the preliminary enquiry on which, with the consent of the parties, we must now embark, it is necessary to refer briefly to certain matters which occurred both before and after the appellant joined the Board's service. In June, 1948, the Board set about gathering a staff to enable them to discharge their statutory functions. They inserted an advertisement in the press inviting applications for senior clerkships and other posts. Salaries and qualifications were specified and the advertisement stated that "subject to a probationary period, appointments will be permanent "and pensionable." The appellant applied in response to this advertisement and was interviewed and then appointed after an exchange of letters which add nothing of importance on the present issue. The appellant took up her new post on August 16, 1948. Meantime, a committee of the Board had been at work drawing up terms and conditions of service for the Board's staff of a much more elaborate and comprehensive nature than those which had been mentioned in the advertisement. On August 25, the terms and conditions recommended by the committee were adopted by the Board, and early in September they were duly approved by the Ministry of Health and Local Government. Copies of a document including the terms and conditions thus approved were made available for the staff and it is clear the appellant obtained one of these copies for she says in her affidavit: "I was handed a copy "of the terms of service upon which I was thereafter employed in "my post as senior clerk. I accepted them because I realised that "all details of my employment were not contained in the news- "paper advertisement above referred to and I was fully prepared "to accept any terms of service which were not inconsistent with "the basic terms and conditions upon which I offered myself for,

"and accepted, the said post as set out in the said newspaper adver-
"tisement which were, so far as I was concerned, the salary scale
"and security of tenure."

Now it is evident from this that these terms and conditions (which I shall speak of as the "September conditions") became at least a part of the appellant's contract. The question—and this is really the substance and extent of the preliminary enquiry—is whether the terms of the advertisement are also to be regarded as incorporated in that contract.

Before going further it will be convenient to refer to the relevant portions of these two documents. I have already quoted the material portion of the advertisement. It announced that "appointments "will be permanent and pensionable" and this, according to the appellant, meant that each appointee would be entitled to hold office under the Board during his or her working life and to receive a pension under a superannuation scheme thereafter. The September conditions are contained in a document which sets out in considerable detail the staffing arrangements of the Board. In addition to specifying terms of service it deals with such matters as the numbers, grades and remuneration of officers (Part I), the organisation of the service and its division into branches (Part II), the allocation of duties (Part III), and the qualifications required for different categories of staff (Part IV). The only point about these other heads which I find it necessary to mention is that they recognise a distinction between permanent and temporary staff. Thus, in Part I it is stated that:—

"The above establishment shows the basic minimum per-
"manent staff required and will, in some cases, be supplemented
"by temporary employees until the services are operating satis-
"factorily. In the light of experience it may be necessary to in-
"crease the number."

Part V is concerned with recruitment, appointment and general conditions of service and the most material of its provisions is clause 12, which reads as follows:—

"12. *Dismissal and Reduction in Rank, and termination of em-*
"ployment otherwise:

"The Board may dismiss any officer for gross misconduct and
"may dismiss any officer who is proved to their satisfaction to be
"inefficient and unfit to merit continued employment. Except
"where an officer has been guilty of gross misconduct, the Board
"shall give at least one month's notice of their intention to exercise

"their powers of dismissal under this rule. As an alternative to "dismissal, the Board may order the reduction in rank of an "officer who is found by them to be unfit to discharge the duties "of the grade in which he has been employed. One month's "notice in writing shall be given by all permanent officers who "wish to terminate their employment with the Board."

For the appellant it was contended that this clause, whether read with or apart from the advertisement, specifies the Board's powers of dismissal exhaustively and therefore negatives the existence of any power to terminate the service of a permanent officer who is efficient and well conducted. For the Board, on the other hand, it was submitted that clause 12 only provides for the special cases it mentions and leaves untouched the right of the Board to determine the employment of any officer by proper notice.

Returning to the preliminary issue, the more I study the September conditions, the more I am convinced that they were promulgated in substitution for the terms and conditions of existing staff contracts. They were clearly intended to apply to all the categories of officers specified in the advertisement, and their comprehensive form makes it difficult to think they were meant to be subject to modification by earlier stipulations. But were they accepted by the appellant as being of this substitutionary nature? On the material before us I think the fair inference is that they were. Whether, on their true construction, they are at variance with the terms of the advertisement or not, I am unable to find that the appellant accepted them conditionally. It may be, had she then foreseen the present situation, that she would not have acted as she did; but, as things were in September, 1948, I would hold that her acceptance was unqualified. My conclusion, therefore, is that at the material time (that is when the appellant received notice) the advertisement had ceased to be a contractual document. It remains, however, relevant in one respect. It shows the status of the appellant to be that of an officer of the Board's permanent staff and not that of a temporary officer. This was not in dispute. Whatever the precise signification of the adjectives, it was agreed that the appellant was, at all material times, a *permanent* and not a *temporary* officer.

The next question, then, is whether the Board were entitled to terminate the service of a permanent officer, such as the appellant,

by due notice. The answer involves the import of the word "per-"manent" and the meaning and effect of clause 12.

"Permanent" is a difficult word for it has an elastic meaning and can be used even in contracts of service in different senses. As du Parcq L.J. said in *Henriksen v. Grafton Hotel Ltd.*[1], " 'per-" 'manent' is indeed a relative term, and is not synonymous with " 'everlasting'." In contracts of service it may be used to describe the kind of employment which is not transient or linked to some particular occasion or the performance of some special task; and this negative user will not necessarily imply that the employment will endure as of right. Thus, in *Elderton v. Emmens*[2] where the plaintiff had been appointed as "permanent solicitor" to a company, it was held by the Court of Common Pleas that the word "permanent" denoted no more than a general employment as distinguished from an occasional or special employment, Maule J. observing of the evidence that "it does not show any contract "on the part of the company to retain and employ him as their "attorney any longer than they should think proper. In fact, " 'permanent attorney' means no more an enduring engagement "than 'standing counsel'."

On the other hand, the word may be used to mean that the employment is to endure and continue without the employer (or it may be the employee) having any right to terminate it except possibly on the happening of some particular event, such as the failure of the employee to render satisfactory service. So, in *Salt v. Power Plant Company Ltd.*[3] the Court of Appeal in England held that a stipulation that, in certain circumstances, an engagement was "to remain in force as a permanent one subject to your "continuing to perform your duties to the satisfaction of the "directors" meant that the employment was to continue for the life of the employee if he satisfied the proviso as to the performance of his duties. In that case the contract had provided first for a term of three years' employment, then for termination by six months' notice prior to the end of the fourth year and finally, "in the "absence of said notice," the stipulation I have quoted was to apply. As I read the judgment of Greer L.J. (with whom Slesser and Scott L.JJ. concurred) this decision was not arrived at by giving a primary meaning to the word "permanent," but by viewing the terms of the contract as a whole. In *Ward v. Barclay Perkins & Co. Ltd.*[4] Oliver J. followed much the same process, but with

[1] [1942] 2 K.B. 184, 196.
[2] (1847) 4 C.B. 479, 496.
[3] [1936] 3 All E.R. 322.
[4] [1939] 1 All E.R. 287.

a different result. There the plaintiff contended that as he was a member of the defendant company's permanent staff and entitled as such to participate in the benefits of a staff pension scheme, the company could not terminate his employment by notice until he attained the age of 65 and was entitled to full benefit. After reviewing the conditions and circumstances of the employment Oliver J. held against this contention, saying: "It is, to my mind ....quite impossible to envisage a stipulation implied against the "company that their servants on the permanent staff are entitled "to remain for ever in their employment, for the whole of their "business life."[1]

I do not suggest that these two broad categories are exhaustive; the word seems capable of various meanings, and what its true import is in any given instance will depend on the context and the relevant circumstances. But in the present case the alternatives to be considered seem to me to follow these categories and to be succinctly stated in Mr. Patton's submission on behalf of the Board that "permanent" means either "not temporary" or "not determin-"able"; and it may be added that of these meanings the latter must here mean not determinable by the Board, for it was common case, and is indeed expressly provided by clause 12, that a permanent officer of the Board can terminate the employment by notice.

In my opinion the September conditions and the document of which they form a part use the word "permanent" in the sense of not temporary, and as connoting those members of the staff who occupy established positions, that is to say, positions regarded by the responsible authorities as necessary or desirable for the due discharge of the Board's functions on a long term basis. On this view it is natural that the word should convey to the permanent officer, and to those seeking employment as such, a reasonable expectation of permanence in fact, but such a prospect does not amount to, and must not be confused with, a promise of permanence. I can find nothing in the design or language of the September conditions, or of the remainder of the document incorporating them, to justify the other view and give officers of the Board, because they are "permanent," a right to retain their posts indefinitely if their service is satisfactory. It is, no doubt, true to say that the September conditions bear a marked resemblance to conditions

[1] ibid. 290.

which are currently recognised in the civil service of the Crown. This, however, seems to me to support rather than weaken the conclusion I have expressed. While, as everyone knows, the civil service of to-day offers its permanent staff a very considerable security of tenure in fact, the word "permanent" implies no right to such security and the expression "a permanent civil servant" is commonly used, in this sphere, in speaking of officers whose service can, in point of law, be terminated at the pleasure of the Crown.

I may add here that, even if I am wrong about the advertisement and it should be regarded as part of the relevant contract, I would still come to the same conclusion on this aspect of the matter. While the words of the advertisement which I have quoted above are not as clear as they might be, I think the meaning is that applicants who serve a probationary period satisfactorily will be appointed to permanent and pensionable posts, that is, to posts on the established, permanent staff. The view contended for by the appellant that these words promised the individual an engagement which would be "permanent" in the sense of not determinable, seems to me to be subject, not only to what has already been said regarding the meaning of that word, but also to another consideration. If, in a contract of service, there is a stipulation that the engagement shall be permanent in the sense that it shall not be determinable, the effect, as it seems to me, is that both parties are bound, in the absence of some modifying or exonerating provision or circumstance. I am unable to discern any such provision or circumstance in the case of this advertisement and, accordingly, if it meant that appointments thereunder were not determinable it meant, in my opinion, that the appellant, no less than the Board, was under an obligation to continue her service. But such an obligation could only arise from words much plainer than those of this advertisement and I feel no doubt that, while employed under its terms, the appellant was entitled to terminate her service on giving due notice to the Board.

I come, then, to clause 12. I have already stated the substance of the rival submissions upon it. While it has been convenient to consider the meaning of the word "permanent" separately, the effect of clause 12 necessarily involves that question also and must be considered in the light of what I have said upon it.

In my opinion clause 12 does not preclude the Board from terminating the employment of a permanent officer by proper notice. I may enumerate the reasons which, taken together, lead me to

this conclusion as follows. (1) If, as I would hold, the status of a permanent officer is not, in itself, such as to deny to the Board the right of determining the engagement by notice, the withdrawal of such right, to be effectual, should be clear and unambiguous. (2) Neither in clause 12 nor elsewhere does the contract expressly or by plain implication take away that right. (3) As respects dismissal, clause 12 only provides for cases where an officer has been guilty of gross misconduct, in which event no notice need be given, or has proved to be inefficient and unfit for continued employment, in which event at least one month's notice must be given of the Board's intention to "exercise their powers of dismissal "under this rule." The enactments considered in *Gould v. Stuart*[1], a decision of the Judicial Committee cited on behalf of the appellant, go much further than, and are clearly distinguished from, these provisions which fall short of manifesting an intention to abrogate all other powers of terminating the contract. The words "inefficient" and "unfit" must be read conjunctively, and there is no ground for assuming that the only officers whom the Board might think it right and in the public interest to get rid of would be those who had been guilty of *gross* misconduct or who had been proved inefficient. (4) The heading of the clause, which reads "Dismissal and reduction in rank, and termination of employment "otherwise," does not suffice to make the clause comprehensive. It is but a summary of what the clause contains and the last words relate to the last sentence of the clause which provides for the notice to be given by all permanent officers. (5) This last mentioned provision, though not conclusive, reinforces the view that the word "permanent" in the expression "permanent officers" does not signify employment of an enduring nature. And (6), many of the clauses in the September conditions seem capable of applying to temporary officers, some classes of which are mentioned in the scales of remuneration. I see no reason why clause 12 (apart from its last sentence which makes it clear that it applies only to permanent officers) should not apply to temporary officers. But the Board's right to terminate their employment by notice is undoubted and if this right is not ousted by the text of clause 12, it is difficult to see why the same right as respects permanent officers should be.

For these reasons I am of opinion that the Board had power to terminate the appellant's employment by giving her due notice.

[1] [1896] A.C. 575.

The question remains whether the notice given was due notice. If, as the older authorities would indicate, the employment should be regarded as from year to year, the six months' notice terminating on the commencement date, which was in fact given, would undoubtedly, in the absence of any stipulation for a different period, be due notice. If, on the other hand, the requirement was simply that reasonable notice should be given, the position would be the same for I think the notice period in this case was reasonable in all the circumstances. I therefore hold that, whether the service was on a yearly basis or not, due notice to determine it has been given.

On these grounds, I would dismiss the appeal and answer the third question in the affirmative, as Curran J. has done, though for different reasons.

PORTER L.J. (read by the Lord Chief Justice): In this case it is admitted that the appellant was appointed as a permanent and pensionable officer of the staff, but counsel for the Board said that "permanent" meant either "*not terminable*" or "*not temporary*"; that it could not mean "not terminable" because clause 12 did empower the Board and also the appellant to terminate the employment, and therefore it must mean "not temporary, "and that, instead of being employed on a weekly or monthly basis or for a special job, a staff officer held a position which was terminable but not temporary. As it was put, the staff officer had a reasonable prospect or expectation of continuing employment, but not security of tenure which was the meaning attributed by the appellant to the words of the advertisement.

Like my brother Black I have seen in our local newspapers some advertisements for situations in public boards containing the words "permanent and pensionable," but I have also seen others which offer employment for several years "with prospects of permanency" or "with prospects of permanency on satisfactory completion of probationary period." The contrast between these advertisements is very significant, as shewing that a permanent and pensionable appointment is quite different from a reasonable prospect of permanent employment. In one case after a satisfactory period of probation the officer has a vague prospect of permanency—lasting only so long as suits the convenience of the employer—while in the other he will hold a permanent and pensionable appointment subject, not to the pleasure of the employer, but only to the express terms and conditions of the contract. Yet, according to the con-

tention of the Board, the appellant's position is the same as if she had been offered and accepted the prospect of permanency after a satisfactory period of probation. According to their ordinary and natural meaning, the words of the advertisement amount to a representation by the Board that the successful applicant, after a satisfactory probationary period, will be entitled to a staff appointment which will continue until he or she attains the usual pensionable age. No one has suggested that the employment is not terminable. It would, of course, be terminable by death, or by the gross misconduct or incompetency of the officer, but the case for the appellant is that the Board has no right to terminate it except under clause 12.

In my opinion the words of the advertisement and the schedule are quite clear, but even if they were somewhat doubtful they should be construed in accordance with the maxim "*Verba fortius accipiuntur contra proferentem.*"

If the contention of the Board is right that the appellant had merely a reasonable prospect of permanent employment and a pension, she was in a precarious and uncertain position dependent upon the arbitrary decision of the Board with the constant fear of dismissal hanging over her head. If she had been dismissed, say, at the end of the first or second year, she would have lost both her position and her pension, and I cannot find any term in the contract which would have entitled her to recover the deduction made from her salary as compulsory contributions to the superannuation fund. To represent to intending applicants that such a position is "permanent and pensionable" would be not only erroneous but grossly misleading.

That the Board, so far from intending the advertisement to be misleading, intended it to be understood in the sense in which it was understood by the appellant as the basis of the contract is indicated, if indeed it is not proved, by the reference subsequently made in the schedule to the tabulated list of the grades, numbers, and remuneration and conditions of service of the officers of the staff where it is stated that the list therein set out shews "*the basic minimum staff required*" and that it might be necessary to increase the number in the light of experience, which clearly indicated to the appellant and the other staff officers that there would be no reduction of their numbers on the ground of redundancy—which is the sole ground of dismissal now alleged by the Board. The

contention that these words when read in the light of the words of the advertisement have no legal effect except to give a staff officer a reasonable prospect or expectation of permanent employment means that they have no legal effect at all. It was suggested that the words "permanent and pensionable" apply not to the officer but to the office or position on the staff. The advertisement however is quite clear—"*appointments* will be permanent and "pensionable"—which must mean that the appointees will be permanent and pensionable staff officers. The permanence of the office would offer little inducement to an applicant who might be discharged after a year or two of service.

I turn now to clause 12 of the schedule which is entitled "Dis- "missal and Reduction in Rank and Termination of Employment "otherwise." In this paragraph the power of dismissal is confined to cases of misconduct, inefficiency and unfitness. Now one would naturally think that such an important matter as the power to dismiss a permanent officer in any other case would have been specially mentioned, if not in clause 12, at all events somewhere among the many elaborate and comprehensive terms and conditions of service. The omission is highly significant and furnishes additional evidence that the power now claimed by the Board was never intended and in fact does not exist.

As against this inference counsel for the Board said that clause 12 applies to temporary clerks as well as to permanent officers, and that the inference would apply also to them, which would lead to the absurd conclusion that temporary clerks on a weekly basis could not be dismissed without cause whereas by virtue of the very terms of their temporary engagement, as everyone must admit, they can be discharged on a week's notice.

In my opinion clause 12 was not intended to apply to temporary clerks, not merely because the right of dismissal for misconduct, inefficiency and unfitness is implied in an ordinary contract of service, but also because it is provided that one month's notice must be given in the case of dismissal for inefficiency and unfitness. That is applicable to a permanent staff officer but it would be an absurd provision in the case of a temporary clerk who can be dismissed on a week's notice. Further, the reduction in rank to a lower grade, which may be substituted as an alternative to dismissal, cannot possibly apply to a temporary clerk. The reason is clear. Only males are employed as temporary clerks (Grade I) and only females as temporary clerks (Grade II) and there is no

means, so far as I know, by which the reduction of a clerk from Grade I to Grade II can be effected unless the Board possesses the extraordinary power of producing a transmutation of sex in the offending clerk.

No doubt the word *permanent* is susceptible of different meanings depending upon the context and the circumstances in which it is used, but when used with the word pensionable in an advertisement by the Board inviting applications for staff appointments it seems to me that the ordinary meaning which these words would convey to an applicant, who was probably considering what he would gain by resigning his existing employment, was that subject to a satisfactory probationary period the staff appointment would continue until he attained a pensionable age. That the contract was intended to include pension rights as well as continuing employment is apparent not only from the advertisement but also from the provision in the memorandum for a deduction of 6 per cent. from the salary in respect of the superannuation scheme—a deduction which could not have been made unless by agreement with the appellant.

A few cases were cited to us on the meaning of the word "per-"manent."

In *Elderton v. Emmens*[1], to which the Lord Chief Justice has referred, the directors of a company by a resolution appointed the plaintiff their *permanent* attorney and solicitor. Some months after they appointed another solicitor and gave him their legal work. It was held that the word *permanent* denoted no more than a general employment as distinguished from an occasional or special employment. A solicitor who acts occasionally or intermittently as and when required by a client cannot be said to be in the permanent employment of the client, but an officer who is in the permanent pensionable and wholetime employment of the Board is in a totally different position.

Ward v. Barclay Perkins & Co. Ltd.[2] was an action for damages for wrongful dismissal. The company had established a staff endowment and pension scheme to which the plaintiff had contributed for 6 or 7 years on the footing that he was a "staff employee" as defined by the rules of the scheme. He was discharged by a three months' notice, not for misconduct or incompetence, but because there was no scope for his advancement. "Staff employee" was

[1] (1847) 4 C B. 479.

[2] [1939] 1 All E.R. 287.

defined by the rules as meaning every male employee on the permanent staff whose name appeared in the register and the expression "the staff" was to be construed accordingly. The plaintiff contended that it followed from his admission as a staff employee into the scheme that a term for permanent employment was thus imported into the service agreement subject, as was admitted, to the health of the employee, his good behaviour and competence. Oliver J. decided against the plaintiff. He said that the plaintiff's employment was subject to the exigencies of the company's business and that according to the rules the Board had the power of determining the whole scheme on giving the trustees of the scheme six months' notice in writing.

This was not the case of a contract for a permanent and pensionable appointment. It was an attempt to introduce into the service agreement the term of permanent employment because of the definition of "staff employee" contained in the rules of the superannuation scheme. In any event the decision is in no way binding on this court.

Salt v. Power Plant Co. Ltd[1]: a decision of the English Court of Appeal consisting of Greer, Slesser and Scott L.JJ. was cited, and I think rightly cited, in support of the appellant's case. The plaintiff was employed by the company upon the terms of a letter dated December 24, 1925, which provided that the engagement should be for a minimum period of three years subject to the right of the company to determine the agreement in case of wilful default. The letter continued: "The company shall have the right to terminate the agreement after the expiration of the above-mentioned "period by giving 6 months' notice in writing prior to the en- "suing 31st December and in the absence of such notice the engage- "ment to remain in force as a permanent one." The company gave 6 months' notice to expire on December 31, 1936. The plaintiff sued for damages for wrongful dismissal. Horridge J. dismissed the claim but the Court of Appeal held that owing to the absence of a notice to determine the employment at the expiration of the three years, the plaintiff's engagement was to be for life and there consequently was a breach of the agreement.

The case for the company was the same as that which was made for the Board, viz., that notwithstanding the use of the word "per- "manent" the engagement was merely for general employment determinable by six months' notice. Greer L.J. said[2]: "I think it

[1936] 3 All E.R. 322. [2] ibid. 324.

"means, quite clearly, that at the end of the 3 years, he is to have "a quite different status from that which he had before the beginning "of the 3 years, namely, that he is to have a permanent employ- "ment, that is to say, it is to be an employment for life, subject "to the proviso which is mentioned in the last words of the letter, " 'subject to your continuing to perform your duties to the satis- " 'faction of the directors'.... This is the case of a man who had, "according to my view, got an engagement which was to last for "life, or at any rate for the joint lives of himself and the com- "pany, but I think for his life, because I think there are authorities "to the effect that if a company winds up, that is a dismissal of "the servants, and they can then prove for damages and get their "dividend, whatever it may happen to be." Slesser and Scott L.JJ. agreed without comment.

In my opinion the case of the appellant is much stronger because the meaning of "permanent" is supplemented and explained by the word pensionable, which besides holding out the promise of a pension, also serves to fix, as it were, a term to the permanent employment by indicating that the employment would continue until appellant attained the usual pensionable age or served the necessary number of years in order to qualify for a pension under the contributory superannuation scheme.

Further, it is urged on behalf of the Board that there is nothing in the advertisement or clause 12 or in any of the terms and conditions to deprive the Board of the common law right of dismissal by proper notice which is generally implied in the relationship of master and servant. A similar argument was advanced in *Salt's* case[1] and was rejected, as I think rightly, by the Court of Appeal. For the reasons I have mentioned the case for the appellant is much stronger.

The right to terminate a contract of service is not an essential element of the relationship of master and servant, but where there is no express provision for such a right and there is nothing in the contract to fix the duration of the service or to oust the implication of such a term the employer is entitled to terminate the contract by reasonable notice. But, as Scrutton L.J. said in *Reigate v. Union Manufacturing Co. (Ramsbottom)*[2]: "The first thing is to "see what the parties have expressed in the contract; and then an "implied term is not to be added because the Court thinks that it

[1] [1936] 3 All E.R. 322.

[2] [1918] 1 K.B. 592, 605.

"would have been reasonable to have inserted it in the contract. "A term can only be implied if it is necessary in the business sense "to give efficacy to the contract; that is, if it is such a term that it "can confidently be said that if at the time the contract was being "negotiated some one had said to the parties, 'What will happen " 'in such a case,' they would *both* have replied, 'Of course so and " 'so will happen; we did not trouble to say that; it is too clear.' "Unless the Court comes to some such conclusion as that, it ought "not to imply a term which the parties have not expressed."

The implication must, in all cases, be founded on the presumed intention of the parties and will only be made when it is necessary to give the transaction that efficacy that *both* parties must have intended it to have, and if the contract is effective without the implied term and is capable of being fulfilled as it stands, an implication ought not to be made: *Consolidated Goldfields of South Africa, Ltd. v. Spiegel & Co.*[1]; *The Moorcock*[2].

In *Brodie v. Cardiff Corporation*[3] Lord Atkinson expresses the principle thus: "The introduction of an implied term into the "contract of the parties....can only be justified when the implied "term is not inconsistent with some express term in the contract, "and where there arises from the language of the contract itself, "and the circumstances under which it was entered into, an in- "ference that it is absolutely necessary to introduce the term to "effectuate the intention of the parties."

Discussing this matter in *Luxor* (*Eastbourne*) *Ltd. v. Cooper*[4] Lord Wright said: "It is agreed on all sides that the presumption is against "the adding to contracts of terms which the parties have not ex- "pressed. The general presumption is that the parties have expressed "every material term which they intended should govern their "agreement, whether oral or in writing. But it is well recognized "that there may be cases where obviously some term must be im- "plied if the intention of the parties is not to be defeated....This "does not mean that the Court can embark on a reconstruction of "the agreement on equitable principles, or on a view of what the "parties should, in the opinion of the Court, reasonably have "contemplated. The implication must arise inevitably to give effect "to the intention of the parties."

The application of these principles seems to me to prove that it is impossible to import into the express contract a new term which

[1] (1909) 25 T.L.R. 275.
[2] (1889) 14 P.D. 64.
[3] [1919] A.C. 337, 358.
[4] [1941] A.C. 108, 137.

would give the Board the power which it now claims to terminate the contract.

I would sum up these objections as follows:

(a) The contract is effective without the implied term and can be fulfilled as it stands.

(b) The term is not necessary to effectuate the express intention of the parties.

(c) The language of the advertisement and the schedule makes it very difficult to presume that the Board intended the term.

(d) That the appellant, against whom the implied term is sought to be enforced, ever intended or could have intended that she should be bound by it is highly improbable.

In my opinion the contract was not validly determined and therefore I would allow the appeal and answer the third question in the negative[1].

Black L.J.: In my view the primary and fundamental question to be decided in this case is the meaning to be attached to the word "permanent" as used in the advertisement published by the Northern Ireland General Health Services Board in June, 1948, on the basis of which the appellant claims that she entered the Board's employment. That advertisement stated that "Subject to "a probationary period, appointments will be permanent and "pensionable." On the one hand it is contended that the effect of the word "permanent" in this phrase is that the appointments made by the Board would be such that they would not be determinable, at any rate by the Board, during the appointee's working life unless for some good reason such as misconduct or incapacity. On the other hand it is said that the use of the word "permanent" in an advertisement, such as this, seeking applications for employment, simply means, and would in the ordinary course be understood to mean, that the employers were not offering merely temporary jobs which might only continue for a few weeks or a few months, but were offering appointments on their regular established staff which the employees might look forward to as likely to continue indefinitely, but which the employers would nevertheless be entitled at any time in the future to determine by proper notice.

The word "permanent" is not of course a word of fixed and definite meaning necessarily connoting what I may call absolute

[1] [This judgment was not revised by Porter L.J.—Editor.]

permanence. Thus a house in which a man and his family have lived for a number of years will ordinarily be spoken of as their permanent residence but this does not negative the possibility of their deciding to leave it at any time. One might readily multiply examples in which the word "permanent" is used in ordinary speech without any idea of what I have ventured to call absolute permanence. And if judicial authority is required for the proposition that the word is not necessarily to be construed as connoting absolute permanence, reference may be made to such cases as *Beaufort v. Crawshay*[1]; *Yorkshire Railway Wagon Co. v. Inland Revenue Commissioners*[2] per Warrington L.J.; *Henriksen v. Grafton Hotel, Ltd.*[3] per du Parcq L.J.

What has to be determined in any individual case accordingly is how the word "permanent" is to be construed in the circumstances of that particular case. In the present case the advertisement, so far as it affected the appellant, was an invitation to apply for the position of a clerk. When an employer advertises for a clerk and states that the appointment will be a permanent one, does that mean that appointment will be permanent in what I have called the absolute sense of the word, so that an applicant, if appointed, would be entitled to claim to hold the post during the whole of his or her working life, and to be exempt from any liability to dismissal by notice, except for some such reason as misconduct or incapacity? It is, of course, trite law that words and phrases are prima facie to be taken to have the meaning which they bear in the vocabulary of ordinary life. The question, therefore, is how in such circumstances the word "permanent" in the advertisement would be construed by the ordinary person answering such an advertisement. For my part I have little doubt as to this. If a reporter engaged in a temporary capacity by a newspaper is offered a permanent appointment on the reporting staff, I do not think it would occur either to employer or employee that he was being offered a position which he would have a legal right to retain for the whole of his working life and from which he could not be dismissed. And I feel certain that the same view of the meaning of the word "permanent" would be taken by any ordinary man appointed to what was described as a permanent position. He would regard the appointment as being not just a temporary or seasonal one, or as one merely for a fixed period, but as one which might ordinarily be expected to continue for a prolonged period or even

[1] (1866) L.R. 1 C.P. 699.
[2] (1924) 94 L.J. K.B. 134, 138.
[3] [1942] 2 K.B. 184, 196.

perhaps indefinitely, but I do not think that it would ever occur to him that such an appointment would have the effect of creating a relationship which the employer would not be entitled to determine by notice. His hopes and expectations of continued employment, would, of course, vary according to whether the prospective employer was a public or semi-public board or a great commercial company on the one hand, or the owner of an obviously minor concern such as a small retail shop on the other. But this, in my view, is merely a question of degree.

During the course of the argument Mr. Patton on behalf of the Board sought to refer to the terms of other advertisements in the press containing similar phrases. I then expressed the view that it was not admissible to seek to construe the Board's advertisement by the terms of advertisements published by other employers. On reflection, however, I think I spoke too hastily. It is well established that the courts are entitled to refer to standard dictionaries to ascertain the meaning or meanings which words and phrases may bear. So, too, if it can be shown that a word or phrase is commonly used in advertisements offering employment, I see no reason why the court should be debarred from looking at such advertisements in case they may possibly throw light upon the meaning which the word or phrase would be understood to bear in the advertisement under consideration. It goes without saying that such a course should be pursued with extreme caution. One would have to be sure that an adequate number of examples of the usage were collected, that the circumstances of the various cases did not differ in any way which mattered from the case under consideration, and that one could be definitely satisfied that there was a settled and uniform understanding as to the meaning to be attached to the word or phrase. Whether it is legitimate for a member of the court to rely upon the results of such an investigation undertaken by himself may certainly be open to grave doubt. But as a matter of interest I may say that since the hearing of this appeal I have scrutinized, over what I am satisfied is a sufficient period, the advertisements inviting applications for employment appearing in more recent issues of the newspaper which contained the advertisement upon which the appellant relies, and I find that in practically every day's issue of the paper there is to be found some advertisement inviting applications for a permanent position. It is abundantly clear from the nature of these advertisements, of which I have collected a substantial number relating to positions

of very varying types, that the advertisers never intend the word "permanent" to be understood in the sense of absolute permanence and that any person applying for a position described in an advertisement as a permanent one would be bound to understand that, though the appointment was intended not to be merely for a fixed period but to be a continuing one, yet nevertheless it would bear the ordinary characteristic of being determinable by reasonable notice by either party.

So far as decided cases go there is a curious lack of judicial authority on the meaning of such phrases as "permanent appointment" or "permanent position." Such authority as there is, however, seems on the whole to favour the view at which I have arrived. I need only to refer to the phrases in the judgments of Maule J. in *Elderton v. Emmens*[1] and Oliver J. in *Ward v. Barclay Perkins & Co. Ltd.*[2], already quoted by the Lord Chief Justice, and to the decision of an Australian court in *Tyers v. Barmera Packing Co. Ltd.*[3]. The case of *Salt v. Power Plant Co. Ltd.*[4] is clearly distinguishable as it turned upon the construction to be given to a special and peculiar stipulation in a particular contract.

It was not suggested that during the earlier days of the appellant's service with the Board there was any stipulation or condition regarding her tenure of office save such as might be inferred from the statement in the advertisement that her appointment would be permanent and pensionable. And from what I have already said it will be gathered that in my view this phrase did not amount to a condition that upon the satisfactory completion of her probationary period her appointment would be certain to continue for the whole period of her working life, and that it would not be determinable by the Board. I think, however, that the advertisement and the letter of July 29, 1948, to the appellant from the Board, certainly conveyed that upon satisfactory completion of her probation the applicant would have the status of a senior clerk upon the Board's permanent staff but, so far as I can see, the terms of her service were not at that stage set out with any further particularity than was conveyed by the advertisement and the letter of July 29, 1948, already mentioned.

The appellant entered on her employment with the Board on August 16, 1948, and six months afterwards, on February 16, 1949, having satisfactorily completed her probation, she was confirmed

[1] (1847) 4 C.B. 479, 496.
[2] [1939] 1 All E.R. 287, 290.
[3] [1930] S.A. S.R. 123.
[4] [1936] 3 All E.R. 322.

in her post as senior clerk and thus became an established officer of the Board.

During the month of August, 1948, the Finance and General Purposes Committee of the Board was engaged in formulating a scheme of staffing proposals and terms and conditions of service for the Board's staff. These finally took shape and on August 18, 1948, were recommended by the committee for adoption by the Board. These terms and conditions of service were adopted by the Board on August 25, 1948, and on September 3, 1948, the Ministry of Health and Local Government's approval of them was notified to the Board. The appellant avers that sometime shortly after August 18, 1948, she was handed a copy of these terms and conditions of service and accepted them as the terms of service upon which she was thereafter employed in her post as senior clerk.

It was debated during the argument whether these terms and conditions alone were to be regarded as the terms and conditions upon which the appellant was to be thereafter employed or whether the original advertisement of June, 1948, was to be construed in conjunction with these terms and conditions as constituting the plaintiff's contract. In my view it really does not matter. There is but little reference to permanent or permanency in the terms and conditions. After setting out a scheme of different grades of employees, the numbers of employees for each grade and the salaries appropriate to such grade, the document goes on to state that "the above establishment shows the basic minimum permanent "staff required" but such a phrase in my opinion falls very far short of constituting any contractual agreement that individuals appointed to what is here termed the permanent staff would be entitled to enjoy their positions in what I have, earlier in this judgment, called absolute permanency. The condition most relied upon by the appellant was clause 12 of the General Conditions of Service which sets out the Board's powers of dismissal of officers guilty of gross misconduct and of officers who are proved to be inefficient and unfit to merit continued employment, and also provides that one month's notice in writing shall be given by all permanent officers who wish to terminate their employment with the Board. I fail to see how a clause setting out a power of dismissal in special cases can have the wide effect of depriving the Board of the power of dismissal of employees by proper notice which, like any other employers, they would ordinarily enjoy. If I am right in the view

that I have taken that the appellant could not claim absolute permanency of employment but would be subject to dismissal upon notice so long as the terms of her employment were to be sought in the original advertisement, it would indeed be an extraordinary result if a clause such as clause 12, without any mention at all of any limitation of the Board's ordinary right to determine the employment of members of their staff by notice, but only dealing with certain limited and specified cases, should be construed as having conferred a completely new status of irremoveability on all the members of the Board's established staff. I cannot accept that clause 12 can legitimately be construed as having any such effect.

I think a hint of what was probably the intention of the Board is to be found in clause 3(h) of the conditions regarding sickness benefit. This subclause speaks of the right of an officer whose employment is terminated by reason of permanent ill health or infirmity to receive the period of notice provided by his contract of service. This seems to me to suggest that it was contemplated that formal contracts of service would be entered into by the Board with the individual members of their staff. Such contracts, if entered into, would presumably contain provisions as to how the contracts should be determined, including the length of notice to be given on either side. In the absence of such contracts or of such special provisions I am of opinion that the Board are exactly in the position of other employers in regard to the right to determine the employment of members of their staff by proper notice and that the word "permanent" is not used in any of the relevant documents in any sense which would negative such right.

In the result I concur in the conclusions arrived at by the Lord Chief Justice and agree that the appeal should be dismissed. It was not contested that, if the legal position was that the Board was entitled to determine the appellant's contract by notice, the notice in fact given by the Board was sufficient and effectual.

Appeal dismissed.

Solicitor for the appellant: *J. Morris McKee.*

Solicitors for the Board: *Cleaver, Fulton & Rankin.*

S.M.M.

IN RE McCONNELL.
HUNTER AND OTHERS v. McCONNELL AND OTHERS[1]

Will—Construction—Gift to future trustees—Rule against perpetuities.
Practice—Court of Appeal—Death of judge—Court equally divided—Liberty to enter appeal for rehearing.

A testator whose will established complicated trusts directed that any future trustee who might be appointed to carry out the trusts of the will should be paid £100. The trusts were so framed that all the beneficial interests would necessarily vest within the period prescribed by the rule against perpetuities, but there was a possibility that the trusts might continue beyond that period and that it might become necessary to appoint a new trustee outside that period. An originating summons having been taken out to decide a number of questions arising out of the will, Curran J. held, inter alia, that the gift to future trustees was void as contravening the rule against perpetuities. On appeal to the Court of Appeal that court sat with three judges, one of whom died before judgment was given. The remaining judges being divided in opinion it was *held* that the parties should be at liberty to enter the appeal for rehearing, but in the absence of any such rehearing the order of the court below should stand.

Per Lord MacDermott L.C.J. The gifts to trustees are really attendant on the trusts of the will, and the circumstances of each appointment of a trustee should be awaited before the question of the validity of each gift is settled.

Per Black L.J. The gifts to future trustees are void as they could vest outside the perpetuity period.

APPEAL from an order made by Curran J. on the hearing of an originating summons.

John McConnell, who died on March 10, 1928, by his last will dated February 12, 1928, appointed four persons as executors and trustees of his will, and after bequeathing certain specific legacies he devised, bequeathed and appointed to these executors and trustees all the property not previously specifically bequeathed upon the trusts therein set out. These trusts began with one of the payment of an annuity of £1,000 per annum for life payable to the testator's widow and a disposition of the testator's dwelling-house, and then continued with the establishment of two trusts of blocks of shares in the Prudential Assurance Company, one of 300 shares and one of 900 shares. The 300 shares trust was to pay the income of one half to each of two named sons for life with a gift over in each case for the issue of such son, or in default of issue upon the trusts of the residuary estate. The 900 share trust, which was not

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Porter and Black L.JJ.: May 14, June 6, 7, 1956. Porter L.J. died July 10, 1956. Lord MacDermott L.C.J. and Black L.J. delivered judgment on July 31, 1956.

to take effect until after the death of the testator's wife, was to pay the income of 200 of this parcel to one of eight named grandchildren (none of them being children of the two named sons) for life, and to pay the income of 100 of this parcel to each of the seven remaining grandchildren for life, and upon the death of each such grandchild his or her share was to be held upon the trusts of the residuary estate. The will contained provision for maintenance, education and advancement during the minority of the eight grandchildren and any issue of the two named sons, and for the purposes of these trusts minority was defined as twenty-one in the case of females and twenty-five in the case of males. The residuary estate was directed to be accumulated during the lifetime of the testator's wife, and on her death to be held on trust to pay the income equally to five named children of the testator for life and then in trust for the issue of such children.

The will also contained the following provision: "I direct that "my Trustee or Trustees who may be appointed under and by "virtue of the Trustee Act, 1893, to carry out the Trusts or the "remaining Trusts of this my Will shall each be paid the sum of "one hundred pounds...."

A number of questions on the construction of the will were raised on an originating summons before Curran J. The case is reported only on the following question relating to the direction to pay £100 to any future trustee: "Does the bequest of £100 to "any future trustees contravene the rule against perpetuities? If so, "to what extent?" To this question Curran J. answered: "Yes." The plaintiffs appealed to the Court of Appeal.

Patton Q.C. and *MacDermott* for the appellants.
Gibson for the first-named respondent.
McGonigal for the grandchildren of the testator.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. after dealing with other matters raised by the appeal, continued:

The next provision of the will to call for consideration reads as follows:

"I direct that my Trustee or Trustees who may be appointed "under and by virtue of the Trustee Act, 1893, to carry out the "trusts or the remaining trusts of this my Will shall each be paid "the sum of One hundred pounds and should any Trustee so "appointed be a Solicitor or an Incorporated or Chartered

"Accountants (*sic*) and act as such to my Estate he shall be entitled "to the costs or fees which under this my Will I have directed "should be paid to Mr. John Trevor McConnell, Solicitor, Lis- "burn and Mr. Frederick George Walsh, Chartered Accountant."

The first question submitted by the summons in respect of this provision runs thus:

"IX (a) Does the bequest of £100 to any future trustee contra- "vene the rule against perpetuities? If so, to what "extent?"

Curran J. answered this question "Yes." Before this court the trustees submitted that this answer was wrong in point of law and asked that the answer "No" be substituted for it.

I find this a matter of considerable difficulty. It does not relate to a succession of interests in the same subject-matter or to a gift to a class; it relates to a gift to each individual who shall qualify, during the period to which the provision relates, by being appointed a trustee under the Trustee Act, 1893. We were not referred to, nor have I been able to find, any authority directly in point. It was conceded that the trusts of the will did not, on their true construction, contravene the rule against perpetuities, but it was submitted that the trusts could lawfully endure beyond the perpetuity period since the last vesting might find some beneficiary who was then entitled unable, by reason of minority or some other form of incapacity, to give a good discharge for his share of the trust funds; and in that event a new appointment of trustees might become necessary and take place beyond the perpetuity period. The provision under consideration was therefore, the argument continued, wide enough to include payments falling to be made outside that period; and that, it was said, was enough to invalidate the whole provision. In this connection the decision of Romer J. in *In re Lord Stratheden and Campbell*,[1] was strongly relied upon in support of the answer given by Curran J. There, a gift by will of an annuity of £100 to the Central London Rangers "on the appointment of "the next lieutenant-colonel" was held to be void, though charitable. The ground of the decision is thus stated by Romer J.: "It is "a gift conditional on the appointment of the next lieutenant- "colonel. Now, the next lieutenant-colonel may not be appointed "for some time after the death of the present commanding officer; "he never may be appointed at all; and, consequently, it appears "to me that this is a gift conditional upon an event which trans-

[1] [1894] 3 Ch. 265, 267.

"gresses the limit of time prescribed by the rules of law against "perpetuities." I think it must be accepted that, in certain events, the trusts of this will may continue beyond the perpetuity period and I suppose that when the testator died it was a possibility, albeit a bare one, that an appointment under the Trustee Act might not be made until after that period. Yet even so, I cannot but feel that the present instance is distinguishable on its facts from the case just cited, and that there is room here for doing something analogous to what has been done in cases concerning the exercise of special powers, and looking to the circumstances of each appointment. In *Lord Stratheden and Campbell*[1] the validity of the gift had to be settled without awaiting the course of events, but here the gift is really attendant on the trusts and there is no reason why the circumstances of each appointment should not be awaited before the question of validity is settled. I certainly cannot see that to do so would be to promote or encourage the mischief at which the rule is aimed. On the contrary, there is much to be said for upholding gifts which in fact vest within the permitted period and are calculated to ensure that a lawful trust will not lack trustees. I would, accordingly, answer question IX (a) thus: "No, provided "that the appointment in question is not made outside the per- "petuity period applicable to the trust or trusts concerned."

BLACK L.J. dealt with other matters raised by the appeal and continued:

The next matter to be considered is whether the bequest contained in John McConnell's will in favour of future trustees is void as contravening the rule against perpetuities. The relevant passage of the will reads: "I direct that my Trustee or Trustees who may "be appointed under and by virtue of the Trustee Act, 1893, to "carry out the trusts or the remaining trusts of this my Will shall "each be paid the sum of One hundred pounds." The classical statement of the rule against perpetuities is that no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. Although the trusts of John McConnell's will are so framed that all beneficial interests in the testator's estate must vest within the period prescribed by the rule, it is obvious that the trusts of the will may continue to run much longer and that trustees may possibly be appointed at times outside that period. As has been said in a recently published text book (Morris and Leach on Perpetuities, p. 12) the

[1] [1894] 3 Ch. 265.

rule has progressed into one of the most rigid and mathematical of all judge-made rules. It is well settled that, in determining the validity of an interest, possible and not actual events are to be considered. And it is equally well settled that it is not enough that the interest does in fact vest within the period as events actually occur. The certainty that the interest must vest, if at all, within the prescribed period, must exist at the time of the creation of the interest. Judged by these principles it appears to me that the bequest in the will to future trustees must be held to contravene the rule. I know of no authority which would justify us in waiting to see at what times appointments of new trustees are made and then determining whether the bequests to such trustees are valid. Indeed, the whole current of authority seems to run against such a course. It was suggested during the argument that the bequest, so far as it would benefit trustees in fact appointed within the perpetuity period, might be held good on the analogy of the principles applicable to special powers of appointment. But in relation to the rule against perpetuities special powers of appointment stand within a distinct and circumscribed category of their own, and I am quite unaware of any authority for extending the rules applicable to them to cases alleged to be analogous, even if it be assumed that the present case could justifiably be regarded as analogous, which I very greatly doubt. So far as I have been able to discover the reported case most closely in point appears to be *In re Lord Stratheden and Campbell*,[1] to which the Lord Chief Justice has referred. It seems to me that Romer J., who decided that case, would have felt bound to hold the bequest to future trustees in the present case to be void as infringing the perpetuity rule. I cannot find that the soundness of the decision in *In re Lord Stratheden and Campbell*[1] has ever been questioned and it was quoted as undoubted law by Warrington J. in *Worthing Corporation v. Heather*.[2] Accordingly, I am of opinion that the decision of Curran J. on this point holding the bequest to be void as contravening the rule against perpetuities should be affirmed.

The court being equally divided, liberty to enter the appeal for rehearing, otherwise the judgment appealed from to stand.

[1] [1894] 3 Ch. 265.

[2] [1906] 2 Ch. 532, 538.

Solicitors for the appellants: *John T. McConnell & Son.*
Solicitors for first-named respondent: *Johns, Elliott, Wallace & Co.*
Solicitor for testator's grandchildren: *T. Boyd Girvan.*
Solicitors for testator's children: *J. C. Taylor & Son.*
Solicitor for testator's great-grandchildren: *W. H. M. Brownlee.* 5

S.M.M.

NORTHERN PUBLISHING OFFICE (BELFAST) LTD. v. CORNHILL INSURANCE COMPANY LTD. AND ELLIS[1]

Arbitration—Stay of legal proceedings—Insurance policy—Arbitration clause—Negligence in carrying out term of contract—Contention that arbitration should be in England and not in Northern Ireland—Arbitration clause not applicable to claim in tort—Arbitration Act (Northern Ireland), 1937 (1 Edw. 8 & 1 Geo. 6, c. 8), s. 4.

The plaintiffs took out a policy of insurance in respect of third-party liability arising from the use of a lift on their premises. It was a condition of the policy that the insurers would periodically examine and report on the condition of the lift for the mutual benefit of the insured and the insurers. The policy also provided that any difference arising thereunder should be referred to arbitration. After an accident to the lift due to a fault in the mechanism the plaintiffs informed the insurers of their intention to claim for the damage suffered by the lift. The insurers contended that any claim should be referred to arbitration held in London on the ground that the contract was made in England. The plaintiffs objected to an arbitration in England on the ground that the contract had been made in Belfast and, no agreement on the proper place for arbitration having been reached, proceeded to issue a writ, followed by a statement of claim, alleging negligence in the insurers, the first-named defendant, by their servant, the second-named defendant, by failing to examine the lift properly and by furnishing inaccurate reports. After delivery of the statement of claim the defendants agreed that arbitration should be in Northern Ireland, and then applied to have the proceedings in the action stayed pending the arbitration.

Held, (i) that the defendants had not complied with the requirements of section 4 of the Arbitration Act (Northern Ireland), 1937, in that they had not been, at the time when proceedings were commenced, ready and willing to do all things necessary to the proper conduct of the arbitration; and

(ii) that the claim in respect of damage to the lift was a claim for breach of a common law duty and was therefore not a difference arising under the policy, and accordingly was not subject to the arbitration clause.

MOTION to stay proceedings in an action pending the hearing of an arbitration.

The plaintiffs, a limited company carrying on business in Belfast, entered into a contract with the first-named defendant company as insurers to cover with insurance four lifts on the plaintiff's premises in Belfast. In its original form the policy of insurance covered damage to the lifts, but by a later endorsement that cover was excluded, thereby making it a third-party policy. Condition 7 of the policy provided: "The Company shall have the right at all "reasonable times to inspect any apparatus insured under this

[1] In the Queen's Bench Division before Curran J.: Feb. 3, 1956.

"policy and will for the mutual benefit of the insured and the com-
"pany periodically examine and report on the condition thereof."
Condition 13 was in the following terms: "Should any difference
"arise under this policy the same shall be referred to arbitration
"and such arbitration shall be subject to the statutory provisions
"for the time being in force applicable thereto and the obtaining
"of an award shall be a condition precedent to any liability of the
"company hereunder."

In accordance with the terms of condition 7 the defendant company carried out periodic examinations and made reports to the plaintiffs on the condition of the lifts. On December 7, 1952, there was an accident to one of the lifts caused by a defect in the mechanism, though none of the reports had indicated that the part which failed was in any need of repair or further examination. An invitee who was on the premises and was injured by the accident brought an action against the plaintiff company: this action was settled by payment of an agreed sum for damages and costs which were paid by the defendant company on behalf of the plaintiffs. The plaintiffs then intimated their intention of claiming against the defendants in respect of the damage to the lift. By letter dated November 8, 1955, the defendants insisted on an arbitration in London, contending that the contract had been made in England. The plaintiffs, by letter dated November 17, 1955, maintained that the contract had been made in Northern Ireland, and receiving no reply to this letter they issued a writ on December 19, 1955. The writ claimed damages for negligence of the first-named defendants by their servant or agent the second-named defendant (who was a surveyor employed by the first-named defendants) and for breach by the first-named defendants of a contract collateral to the policy.

The statement of claim, which was delivered on December 23, 1955, alleged that "the accident was caused by the negligence of
"the defendants and each of them in carrying out the said examina-
"tions and in the preparation of the said reports and by the neg-
"ligence of the defendant company in furnishing the said reports."
The alternative claim in respect of the breach of a collateral contract was subsequently abandoned by letter.

On January 6, 1956, the defendants wrote to the plaintiffs agreeing to an arbitration in Belfast and then applied under section 4 of the Arbitration Act (Northern Ireland), 1937, to have proceedings in the action stayed pending the hearing of the arbitration.

Jones Q.C. and *McQuitty* for the defendants. The law on the question of staying proceedings for arbitration is conveniently set out in Russell on Arbitration, 14th ed., p. 70 et seq. At p. 81 it is stated that the power of the court is discretionary, and under the heading "Principles upon which the discretion is exercised," there appears the following proposition: "Where parties have agreed to "refer a dispute to arbitration, and one of them, notwithstanding "that agreement, commences an action to have the dispute deter- "mined by the Court, the prima facie leaning of the Court is to stay "the action and leave the plaintiff to the tribunal to which he has "agreed." The plaintiffs cannot say that they are not bound by the arbitration clause in the policy, because the only relationship between the plaintiffs and defendants arose as a result of the policy and the defendants have no duty to the plaintiffs outside its terms. It is submitted that the claim in negligence was introduced as a device to enable the plaintiffs to try to say that their claim is outside the terms of the policy. Something similar was attempted in *Woolf v. Collis Removal Service*[1] where it was held that an alternative claim in negligence did not take the plaintiff's case outside the arbitration clause. In the present case the writ alleged a breach of contract as well as negligence, but the claim in contract was abandoned by letter. The root and basis of this whole matter is that the only link between the plaintiffs and the defendants is to be found in the policy, and the onus is on the plaintiffs to show why the action should not be stayed.

Reid for the plaintiffs. Before these proceedings were initiated the defendants insisted that the arbitration should be held in London, in spite of the fact that Belfast was the obvious place for the "proper conduct" of the arbitration. The apparatus which is the subject of this policy is situate in Belfast and that was where the policy was issued. It was not until after the plaintiffs had delivered a statement of claim and just before the filing of this application that the defendants agreed to arbitrate in Belfast. Such an attitude is hardly consistent with the terms of section 4 which require that the defendants should have been "ready and willing to do all things "necessary for the proper conduct of the arbitration." The court must be satisfied that they were so ready and willing before it can proceed to exercise its discretion, and the fact should be proved by affidavit: *Piercy v. Young*.[2]

[1] [1948] 1 K.B. 11.

[2] (1879) 14 Ch.D. 200.

On the question of liability it is submitted that whether or not the defendants owe any duty in contract, they owe a duty at common law. They cannot be allowed, for the purposes of this application, to say that the claim is under the policy, and then to argue before the arbitrator that they have no liability because the policy deals only with a contract of third-party indemnity. The contract upon which the plaintiffs might have relied is really a collateral contract. The circumstances are such that the defendants might have said: "If you take out our policy we will inspect the lifts and furnish "reports." If those words had been said the plaintiffs could have pleaded this case without any reference to the terms of the policy. In fact the liability arises because the defendants did the work and carried out the inspections. If they had not done so the plaintiffs might have had no cause of action. The position is that the plaintiffs were concerned, not merely with the insurance of the lifts, but for the safety of the public; it was for the safety of the public that they wished to have them properly inspected. The plaintiffs relied on the reports furnished by the defendants, and this claim arises because those reports were negligently prepared and based on inadequate examination. *Woolf v. Collis Removal Service*[1] is an authority in the plaintiff's favour because the decision there was grounded on the special terms of the contract. No such terms were included in the policy in the present case.

CURRAN J.: This is an application by the defendants to have proceedings in this action stayed under section 4 of the Arbitration Act (Northern Ireland), 1937. The action arises out of an accident to a lift on the plaintiff's premises, caused by a defect in the mechanism. The defendant company are the insurers of the lift, and condition 7 of the policy of insurance provides that "The company shall "have the right at all reasonable times to inspect any apparatus "insured under this policy and will for the mutual benefit of the "insured and the company periodically examine and report on the "condition thereof." In the present action the plaintiffs allege negligence on the part of the defendants in that they failed to examine the lift properly and furnished reports which were inaccurate.

On behalf of the plaintiff Mr. Reid contends that before I can consider staying proceedings under section 4 of the Act, I have to be satisfied "that the applicant was, at the time when proceedings "were commenced....ready and willing to do all things necessary "to the proper conduct of the arbitration....", and points out

[1] [1948] 1 K.B.11.

that when the defendants were informed by letter of the plaintiffs' intention to claim against them for the damage to the lift, they replied that the matter must be decided by arbitration in London. The plaintiffs asserted that the contract of insurance had been made in Northern Ireland and maintained that the arbitration should be in Belfast. If things had rested there it is difficult to see how any arbitration could have been held at all. The defendants now admit, as they should have done at the outset, that Belfast is the appropriate place to have the arbitration. In my opinion their conduct tends to show that, at the time when proceedings were commenced, they were not ready and willing to do all things necessary to the proper conduct of the arbitration as required by the section.

The other point raised by Mr. Reid, in my opinion one of substance, deals with the defendants' reliance on the terms of the policy. The defendants say that the plaintiffs are bound by condition 13 of the policy, which provides that "should any difference arise under "this policy the same shall be referred to arbitration....and the "obtaining of an award shall be a condition precedent to any "liability of the company hereunder." Mr. Reid contends that the policy must be construed strictly having regard to the fact that the policy was issued by the defendants and that the insured person had nothing to do with the framing of its terms and conditions; and that the defendants cannot be allowed to rely on condition 13 now, for the purpose of having proceedings stayed, and then turn round later and say that the plaintiffs' claim is bad because it does not arise under the policy.

In my opinion it is quite clear that the present claim does not arise under the policy. It is a unique claim, in my experience, arising, not under the policy, but between two parties, one of whom happens to be the insurer and the other the owner of the lift. The question of liability for damage occurring to the lift is not covered in the policy, which was designed to protect the insured from having to pay damages to a third person. Whatever may be the strength or weakness of the plaintiffs' claim, Mr. Reid has made it quite clear that they do not rely on any contractual obligation arising under condition 7, but solely on the admitted fact that inspections were carried out and reports furnished from time to time, and on the contention that the defendants were guilty of negligence in connection with those inspections and reports. That being the basis of the plaintiffs' claim I am satisfied that it does not arise under the

policy, and is not, therefore, a matter coming within the arbitration clause.

Application refused.

Solicitor for the defendants: *Henry J. Catchpole.*
Solicitor for the plaintiffs: *Martin H. Turnbull.*

S.M.M.

MINISTER OF AGRICULTURE v. HEALEY[1]

Emergency legislation—Agriculture—Importation of livestock—Forfeiture of proceeds of sale of livestock—Validity of regulations—Nature of sale contemplated by regulations—Agriculture (Miscellaneous War Provisions) Act, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28(3)—*Livestock (Import from Eire and the Isle of Man) Regulations*, 1945 (*S.R. & O.* 1945, *No.* 942), *reg.* 5.

Section 28(3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, empowers the Minister to make regulations determining the times and places at which livestock may be imported or brought into the United Kingdom from Eire and the Isle of Man and provides that "any regulations made under this subsection may contain such provisions as appear "to the said Minister to be necessary for securing the due operation and "enforcement of the regulations, including provisions as to the forfeiture "of livestock."

The Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under this power included provisions for the seizure of livestock suspected to have been illegally imported, for the sale of such livestock by authorised officers, and for the forfeiture of such livestock or "the proceeds of sale thereof as the case may be."

Held, (i) that the provisions of the Regulations as to the forfeiture of the proceeds of sale of livestock were intra vires;

(ii) that so long as the sale of the livestock by an authorised officer was bona fide it was not necessary to establish that the best possible price had been obtained.

CASE STATED by the County Court Judge of Down.

On August 25, 1955, a load of 28 pigs was seized by an authorised officer of the Minister of Agriculture who suspected that the pigs had been imported from the Republic of Ireland in contravention of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945. On the same day the authorised officer delivered the pigs to a purchasing officer of the Pigs Marketing Board to whom he gave written directions to receive and sell the pigs and to remit the nett proceeds by cheque. There was no discussion as to the price to be paid for the pigs. Subsequently the Pigs Marketing Board sent a cheque for £176 19s. 6d. to the authorised officer representing the nett proceeds of the sale, the price being calculated at the rate of 20/- per score. It was found as a fact by the county court judge that the then current market price of such pigs was between 51/3 and 52/3 per score.

The defendant having claimed that the pigs were, at the time of seizure, his property, the Minister of Agriculture applied at Dromara

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Black and Curran L.JJ.: Oct. 22, 23, 1956.

Petty Sessions pursuant to regulation 5(4) of the Regulations for an order for the forfeiture of the proceeds of their sale, and the resident magistrate made the order sought. The defendant appealed to Quarter Sessions, contending that the sale contemplated by the Regulations was a proper sale at full market price and that the purported sale was not such a sale in that it was made by an officer of the Pigs Marketing Board to that Board, and that furthermore the price was grossly inadequate. He also contended that the Regulations were ultra vires insofar as they purported to deal with the proceeds of sale of livestock, and that accordingly there was no jurisdiction to make a forfeiture order. On the application of the Minister this case was stated for the opinion of the Supreme Court, the question raised by the case stated being whether the county court judge was right in holding:

(i) that he had no jurisdiction to make an order of forfeiture in respect of the proceeds of the purported sale;

(ii) that the Regulations, insofar as they dealt with the proceeds of the sale of livestock seized by an authorised officer of the Minister, were ultra vires and that consequently neither the resident magistrate nor the county court judge on appeal had jurisdiction to make a forfeiture order.

Lowry for the Minister. The county court judge held that there was no sale in fact, but one must distinguish primary facts from inferences of fact: *Bracegirdle v. Oxley*[1]. On the primary facts in this case I submit that it cannot be said that there was in fact no sale. The defendant claims that the sale was made by the Pigs Marketing Board, but that is not so: it was made by an authorised officer, even though an officer of the Board acted as his agent. It is also claimed that a sale, in order to come within the Regulations, must be what is termed a "proper sale" but I submit that a sale should not be treated as improper unless there is something sinister about it, and that in the absence of fraud or something of that kind the price is not material, at least at this stage of the proceedings.

With regard to the question of vires, it is to be noted that the Regulations do not require proof of a contravention before there is a forfeiture. Once livestock has been seized forfeiture follows automatically unless the claimant discharges the onus laid upon him. In these circumstances, assuming these provisions are intra vires, I submit it is going no further to hold that there is a power to deal with the proceeds of sale of livestock which have been

[1] [1947] 1 K.B. 349, 358.

seized. The cases show that discretionary powers such as those conferred by section 28(3) of the 1940 Act are widely construed, and that there is no rule of construction that general words are incapable of interfering with private rights: *Liversidge v. Anderson*[1]; *R. v. Halliday*[2]; *A.-G. for Canada v. Hallet & Carey Ltd.*[3] In my submission, the Act gives the Minister the amplest of powers, and leaves the choice of method to his discretion, so that he has full power to choose the method he considers appropriate, even if that method went so far as to authorise compulsory acquisition of property.

O'Donnell for the respondent. These Regulations are sufficiently drastic without the power contended for, and if the livestock may be sold at any price it would be tantamount to confiscation. I do not say that this sale was not bona fide in the sense of being fraudulent, or that it was not a sale in the sense that the property did not pass to the Board, but what I say is that the court is entitled to hold that the sale was not a proper sale and was therefore not a sale for the purpose of the Regulations, just as the sale in *Minister of Agriculture v. Nugent*[4] was held not to be such a sale because it was not made by the authorised officer. Under these Regulations forfeiture in a case where a claim is made only takes place when the forfeiture order is made, so that if an authorised officer exercises his discretionary power of sale, he is at the time dealing with the property of another, and is in the position of a quasi-trustee; the Regulations themselves show that this must be so, because they limit the right of a successful claimant, who has established that the livestock were not unlawfully imported, to the recovery of the proceeds of sale; and it cannot be intended that an innocent party should be penalised. Paragraph 17 of the seventh schedule to the Customs Act, 1952, is a useful comparison on this point. I say that a proper sale is a sale, not at an arbitrary price, but one where a reasonable attempt is made to get the best possible price in the circumstances.

I accept that the generality of the words of section 28(3) precludes the court from enquiring as to the necessity of these Regulations, but nevertheless I submit that we are entitled to enquire whether what the Minister has done is within his powers. This court has already declared one sub-paragraph of these Regulations to be ultra vires: *Minister of Agriculture v. McCartney*[5]. The words of the section—"including the forfeiture of livestock"—show that the

1 [1942] A.C. 206.
2 [1917] A.C. 260.
3 [1952] A.C. 427.
4 [1955] N.I. 58.
5 [1948] N.I. 1.

preceding general words were not intended to empower the Minister to make provision for forfeiture, so that the power of the Minister to provide for forfeiture is limited to the forfeiture of livestock, and does not enable him to provide for the forfeiture of the proceeds of sale of livestock. The Minister has provided for the sale of livestock by a seizing officer pending adjudication, as he was entitled to do; but having done so, the only way in which he could have given the court jurisdiction to deal with the proceeds of such a sale would have been by making the forfeiture relate back to the time of seizure as is the case under the Customs Acts. Under these Regulations, however, the forfeiture only operates from the date of adjudication, and accordingly the provisions as to the forfeiture of the proceeds of sale are ultra vires.

LORD MACDERMOTT, L.C.J.: On September 2, 1955, the Minister of Agriculture for Northern Ireland, as complainant, sought an order of the resident magistrate for the forfeiture of the proceeds of sale of 28 pigs which were seized on the ground that they had been illegally imported into Northern Ireland from the Irish Republic. The authorised officer had sold the pigs in exercise of the powers conferred by regulations made under the provisions of the Agriculture (Miscellaneous War Provisions) Act, 1940. These were not the first regulations made under that Act; they were made in 1945 and are to be found in S.R. & O. 1945. No. 942. They have been before this court and other courts in this jurisdiction on numerous occasions. The authorised officer having sold the pigs, the present proceedings, as I have already said, were instituted for the purpose of having the proceeds of sale declared forfeited. The resident magistrate made a forfeiture order, and on appeal the learned county court judge set that order aside upon two grounds —first, that the regulations insofar as they purported to provide for the forfeiture of the proceeds of sale of livestock were ultra vires and, accordingly, that the resident magistrate had no jurisdiction to make the order sought; and, secondly, that no sale had in fact taken place so that there were no proceeds of sale that could be the subject of a forfeiture order.

The case stated raises these two distinct points, and illustrates once again the opportunity which the drafting of these regulations —already much commented on by the courts—gives for ingenious arguments on behalf of claimants. The first point requires reference to the provisions of section 28(3) of the Act of 1940 which provides that the Minister of Food may by regulations "(a) determine the

"times and places at which livestock or any class or description "thereof may be imported into the United Kingdom from Eire or "the Isle of Man;" and "(b) make provision as to the routes to be "followed by livestock so imported or brought or any class or descrip- "tion thereof, and as to their detention for inspection." The sub-section then says that "any regulation made under this subsection "may contain such provisions as appear to the said Minister to "be necessary for securing the due operation and enforcement of "the regulations...." Now the power given to the Minister by those words is designedly very wide, and although it does not enable the Minister to do whatever he pleases, the decisions on the construction of enactments like this make it hard indeed to set bounds to the powers of the Minister, provided that the regulations made are such that they are capable of relating to the purposes contemplated by the sub-section. If the regulations come within that category, then it is very difficult for the court to hold that their provisions could not appear necessary to the Minister for securing their "due operation and enforcement." And so, if the wording of this particular subsection stopped with the words I have quoted, it would seem to me that there was nothing to be said in favour of the point made against the Regulations in this case, namely that the Minister had no power to provide for the forfeiture of the proceeds of sale of livestock. Obviously some sanction was necessary for the enforcement of the regulations as to importation and such forfeiture would appear a normal sanction for that purpose. The subsection, however, does not stop with these words but continues "including provisions as to the forfeiture "of livestock," and Mr. O'Donnell, for the claimant, argues that this specific reference to the forfeiture of livestock shows that, notwithstanding the generality of the preceding words, the power conferred by them was not intended to include the power to provide for the forfeiture of the *proceeds of sale* of livestock. If this argument were well founded it would operate as an extraordinary limitation on the powers of the Minister. There is clearly power to provide for the forfeiture of livestock, as distinct from the proceeds of sale of livestock, and as livestock often have to be sold pending adjudication, an intention to exclude all power to bring about a forfeiture of the proceeds would, I think, be quite irrational. In my opinion, therefore, these concluding words do not cut down the power conferred which remains sufficient to support the provisions for the forfeiture of the proceeds of sale of livestock.

Now, as to the second point. Here the case stated gives rise to considerable difficulty. It sets out the facts, the arguments, the county court judge's findings and his conclusions thereon. Those conclusions are that there was no sale in fact, and that what purported to be a sale was not a bona fide sale and could not be treated as a sale for the purpose of the regulations. What the learned judge meant when he found that the sale was not bona fide is not beyond debate; but reading the case as a whole I think he intended to convey that it was mala fide. Mr. O'Donnell admits, and in my opinion very properly admits, that there was a sale, in the sense that there was a seller and a buyer, and, though he says the price was not the full price, that the property in the pigs passed to the Pigs Marketing Board as purchaser. He further agrees that on the primary facts found, it cannot be said that the sale was not bona fide—that is, that it was a mala fide sale. What he does say is that though there was a sale, and though it cannot be regarded as vitiated by anything like fraud, it was not a sale within the meaning of that term as used in the Regulations. He says that the sale contemplated by the Regulations is what he describes as a "proper sale," that is, a sale where there has been an attempt by the authorised officer to get the best possible price in the circumstances. I cannot go with him that length. Once it is established that there has been a bona fide sale, there is, in my view, a sale such as is contemplated by the regulations, and it does not lie on the authorised officer to prove that he has obtained the best possible price in the circumstances before he can obtain an order for the forfeiture of the proceeds of sale. It may be that a successful claimant would have some right of action against the officer if it could be shown that a proper price was not obtained, but it is not necessary to go into that. The present claimant certainly would not be entitled to make any such claim for there is a finding against him that the pigs were unlawfully imported.

That being so, and the sale having been a sale within the regulations, both of the questions posed by the county court judge should be answered in the negative and the order of the resident magistrate confirmed.

BLACK L.J.: I concur.

CURRAN L.J.: I concur. *Appeal allowed.*

Solicitor for the Minister of Agriculture: *Chief Crown Solicitor.*

Solicitor for the respondent: *P. G. Curran.*

J.P.

STOCKMAN (TRADING AS GOBLIN (NORTHERN IRELAND) SALES AND SERVICE DEPOT) v. MOFFATT[1].

Practice—Remittal to inferior court—Contract claim exceeding £100*—Tender before action of sum sufficient to reduce claim to less than* £100 *—Common Law Procedure Amendment Act, Ireland,* 1870 (33 & 34 *Vict. c.* 109), *s.* 5*—Supreme Court (Northern Ireland) Act,* 1942 (6 & 7 *Geo.* 6, *c.* 2), *s.* 1.

The plaintiff claimed from the defendant a sum exceeding £100 alleged to be due under a contract for the sale of goods. The defendant admitted a part of the claim and sent the plaintiff a cheque in respect of that part. The plaintiff returned the defendant's cheque and sued in the High Court for the full amount of his claim. The plaintiff did not dispute that the sending of the cheque constituted tender before action brought of the amount which the defendant admitted to be due. This amount was sufficient to reduce the plaintiff's claim to less than £100.

On a motion to have the action remitted to the County Court, *held* that the court had no jurisdiction to remit.

Owen v. Roebuck (1901) 36 I.L.T.R. 63 followed.

MOTION TO REMIT. The facts sufficiently appear in the headnote.

Higgins for the defendant. It is admitted that the defendant tendered a sum which would reduce the claim to less than £100, and where it is clear that the only claim sustainable is under £100, the amount endorsed may be reduced and the action remitted: see Wylie, Judicature Acts, 2nd ed. p. 1196-7 and *Clancy v. Ryan*[2]. Wylie also refers to *Timoney v. Alexander*[3], a case in the Court of Appeal, but that is not reported.

Porter for the plaintiff. I submit the court has no jurisdiction to remit in the circumstances of this case, and I rely on *Owen v. Roebuck*[4], a case which is substantially the same as the present one and in which Palles C.B. refused to follow *Clancy v. Ryan*[2].

SHEIL J.: My view is that I have no jurisdiction to make the order sought. I accordingly refuse the motion, and, although it may be regrettable, I feel that I must refuse it with costs.

Motion refused.

Solicitors for the plaintiff: *Bigger & Strahan.*

Solicitor for the defendant: *F. G. Patterson.*

J.P.

[1] In the Queen's Bench Division before Sheil J.: Aug. 23, 1956.
[2] (1883) 17 I.L.T.R. 110.
[3] Unreported.
[4] (1901) 36 I.L.T.R. 63.

McCORMICK v. HARLAND & WOLFF, LTD. (No. 2.)[1]

PRACTICE NOTE.

Costs—Taxation—Three counsel—Case of great magnitude, difficulty or importance.

In a case[2] which was one of considerable complexity and importance but not of great magnitude, the Taxing Master disallowed the costs of a second senior counsel in the Court of Appeal, giving as his reason that on his view of the authorities a third counsel would only be allowed in cases of great magnitude, difficulty and importance. As the amount involved in the Court of Appeal was only £250, the case, in his opinion, could not be regarded as being of great magnitude. Black L.J. held that the Taxing Master had erred in regarding these three elements as being conjunctive, and that as the case was one not only of great difficulty but also of considerable importance, the costs of three counsel should have been allowed in accordance with the usual practice in Ireland, as approved in a series of reported cases which, sitting as a judge of first instance, he considered he was bound to follow.

S.M.M.

[1] In the Queen's Bench Division before Black L.J.: Jan. 13, 1956.
[2] See *McCormick v. Harland & Wolff, Ltd.* [1952] N.I. 118.

FOX v. ARMAGH EDUCATION AUTHORITY: WILLIAM JOHNSTON, SON & CO., LTD. (THIRD PARTY)[1].

Practice—Third party procedure—Necessity of showing prima facie case against third party.

A defendant in an action of tort who seeks to bring in a third party for the purpose of obtaining contribution or indemnity must show that the proposed third party is prima facie liable.

APPLICATION under Order 16, rule 52, by the defendants for third party directions.

The plaintiff while attending a woodworking class at Lurgan Technical School, which was owned and maintained by the defendants, was struck in the eye by a chip of metal from the hammer which he was using. In this action against the defendants the plaintiff claimed damages for negligence and breach of statutory duty. On the application of the defendants an order was made on June 17, 1955, giving leave to issue a third party notice against the retail hardware merchants who had supplied the hammer to the defendants.

Brown for the defendants.

Porter for the third party.

LORD MACDERMOTT L.C.J.: This is an interesting application, and in some respects a more arguable case than *Dowsett Engineering Construction Ltd. v. Sloan*[2] which I considered earlier. [His Lordship stated the facts.]

It is conceded by Mr. Brown on behalf of the defendants that the third party is entitled to object on this application to the order made on June 17, 1955, as an alternative to moving to have it set aside.

It may be that the original suppliers or manufacturers of this hammer which is alleged to have been defective should be brought in as parties. I have not to decide that; on this application. I have to take rule 52 of Order 16 as it stands. I think the defendants have to show that they are, prima facie, entitled either to contribution or indemnity against the suppliers they bought from, and who, it is admitted, are not the manufacturers. I do not think Mr. Brown has shown a prima facie case as against the third party. The information contained in the affidavit in support of the motion is very

[1] In the Queen's Bench Division before Lord MacDermott L.C.J.: Dec. 2, 1955

[2] [1955-56] Ir. Jur. Rep. 31.

meagre. It is not, of course, necessary at this stage for the defendants to prove their case fully against the third party, but at least a prima facie case is required to be made out and the defendants have not, in my view, succeeded on the facts in doing so.

Even if the affidavit were fuller, the defendants would still be faced with the difficulty of showing that in law the third party, the retailers, had any tortious liability in this case.

I refuse the application with costs. There will also be an order striking out the third party from these proceedings.

Application refused.
Third party ordered to be struck out.

Solicitors for the defendant: *C. & H. Jefferson.*
Solicitor for the third party: *T. G. Menary & Co.*

S.M.M.

DOWN COUNTY COUNCIL v. COMMISSIONER OF VALUATION FOR NORTHERN IRELAND[1].

Valuation Acts—Rating—Premises used as hospitals by Hospitals Authority and Tuberculosis Authority—Hereditaments altogether of a public nature and used exclusively for charitable purposes—Occupation of premises by Crown—Poor Relief (Ireland) Act, 1838 (1 & 2 *Vict.*, *c.* 56), *s.* 63 —*Valuation (Ireland) Act*, 1852 (15 & 16 *Vict.*, *c.* 63), *ss.* 12, 16, 23—*Valuation (Ireland) Act*, 1854 (17 & 18 *Vict.*, *c.* 8), *s.* 2.

Hospitals vested in the Northern Ireland Hospitals Authority under the Health Services Act (Northern Ireland), 1948, or maintained by the Northern Ireland Tuberculosis Authority under the Public Health (Tuberculosis) Act (Northern Ireland), 1946, are properly distinguished as exempt in the valuation list under the Valuation Acts on the ground that they are altogether of a public nature and exclusively used for charitable purposes; and the fact that provisions exist for the accommodation in a hospital of paying patients and of private patients from whom doctors can exact private fees does not deprive such hospital of the claim to be distinguished as exempt.

The practice of the Commissioner of Valuation by which property occupied by the Crown is included in the valuation list and distinguished as exempt as being altogether of a public nature is a proper practice. *Sed quaere* whether hospital premises occupied by the Northern Ireland Hospitals Authority or the Northern Ireland Tuberculosis Authority are in the occupation of the Crown.

CASE STATED by the County Court Judge of Down pursuant to section 10 of the Annual Revision of Rateable Property (Ireland) Act, 1860.

The Commissioner of Valuation for Northern Ireland distinguished two hereditaments in the valuation list for 1951-2 as exempt. The hereditaments comprised a general hospital, a tuberculosis hospital, a block of administrative offices, a Roman Catholic chapel and several open fields not being used at the material time. The general hospital was vested in the Northern Ireland Hospitals Authority under the Health Services Act (Northern Ireland), 1948, and administered by the Down Hospital Management Committee under a scheme of management made under that Act. This scheme empowered the hospital to admit paying patients and to allow members of its medical staff to treat private patients at the hospital and to charge fees. The tuberculosis hospital was administered by the Northern Ireland Tuberculosis Authority in accordance with the provisions of the Public Health (Tuberculosis) Act (Northern Ireland), 1946, as amended; this hospital was empowered to charge fees for treatment and services. The office block was used partly

[1] In the Queen's Bench Division before Curran J.: Nov. 25, 1953; Feb. 25, March 2, 30, 1954; April 22, 1955.

for hospital purposes and partly by Downpatrick Rural District Council.

The Down County Council, being dissatisfied with the decision of the Commissioner, appealed to the County Court Judge of Down by way of case stated pursuant to section 16 of the Valuation (Ireland) Act, 1852. The county court judge held that the hospitals were altogether of a public nature and were used exclusively for charitable purposes and that accordingly were exempt from rating. He further held that the administrative block was not exempt as such but that it was open to him to segregate it, and it was therefore segregated and valued on a basis agreed by the parties.

The Down County Council appealed to the High Court by way of case stated and the question before the court was whether the county court judge was right in law in deciding:

(i) that the general hospital was used (a) wholly for public purposes within the meaning of the Poor Relief (Ireland) Act, 1838, and the Valuation Acts (Northern Ireland), 1852 to 1946; (b) exclusively for charitable purposes within the meaning of the said Acts.

(ii) that the tuberculosis hospital was used (a) wholly for public purposes within the meaning of the said Acts; (b) exclusively for charitable purposes within the meaning of the said Acts.

(iii) that it was proper in the circumstances for the county court judge to segregate for rating purposes the hereditaments or portions of hereditaments which form the subject of the appeal.

McSparran Q.C., *Nicholson Q.C.* and *Moody* for the Down County Council.

McVeigh Q.C. and *McGonigal* for the Hospitals Authority.

Harrison Q.C. and *Lowry* for the Commissioner of Valuation.

Patton Q.C. and *Reid* for the Attorney-General.

Cur. adv. vult.

CURRAN J.: The original appeal in this case was brought by the Down County Council under section 16 of the Valuation (Ireland) Act, 1852, from the exemption by the Commissioner of Valuation of certain hereditaments under section 2 of the Valuation (Ireland) Act, 1854. The grounds specified in the notice of appeal were that the said hereditaments were not altogether of a public nature or used exclusively for charitable or other purposes within the meaning

of the Valuation (Ireland) Act, 1852. It is provided by section 23 of the last mentioned Statute that the court before which any such appeal shall be brought is empowered and required to hear and determine the matter of such appeal as stated in such notice of appeal, but not any other cause or matter of appeal.

The questions for determination, accordingly, were whether the said hereditaments were altogether of a public nature, or used exclusively for charitable purposes. The Down County Council sought to have these questions answered in the negative. The learned county court judge who heard the appeal upheld the determination of the Commissioner of Valuation, except with regard to one portion of the hereditaments, on the grounds that they were altogether of a public nature and were used exclusively for charitable purposes. The question for the determination of this court is whether the said decision is right in law.

When the matter came to be argued in this court counsel for the Down County Council sought to introduce a new ground of appeal, namely, that the hereditaments in question were in the occupation of the Crown, and that such hereditaments should not appear in the valuation list at all, or, if they do appear therein, they should be distinguished as being in the occupation of the Crown; and in any event should not be distinguished as "exempt" under the Valuation Acts. I considered it desirable at this stage to invite the Attorney-General to appear in person, or by Counsel, and adjourned the further hearing. When the matter again came before the court the Attorney-General was represented by Mr. Patton and Mr. Reid. Counsel for all the parties, other than the Down County Council, contended that this new ground of appeal was not open to the appellants. I decided to allow counsel for the appellants to proceed with their contention without ruling on the objection. The significance of the contention that the hereditaments in question are occupied by the Crown is, that if they are not distinguished as "exempt" on the valuation list, exemption from rates cannot be claimed, except on the ground that the Crown is not liable for rates; accordingly the County Council will either get its rates or will get a bounty in lieu thereof. If, however, the hereditaments are distinguished on the valuation list as "exempt," the matter is closed, and no rates can be recovered, and the possibility is that no bounty will be paid.

If the Commissioner of Valuation and the learned county court judge were right in holding that the hereditaments were of a public

nature or used for charitable purposes, it follows that the hereditaments must be distinguished as "exempt" on the valuation list, unless, (a) they are occupied by the Crown and (b) that fact relieves the Commissioner of Valuation from the statutory duty he otherwise has of distinguishing them as "exempt." No provision is made for this in the Valuation Acts, and, in my view, such a proposition must be grounded upon the contention that those Acts do not apply to tenements or hereditaments in the occupation of the Crown. Counsel for the Commissioner of Valuation stated at the bar that the invariable practice has been to include Crown occupied property in the valuation list, and to distinguish such property as "exempt", as being of a public nature. I apprehend that where the Crown acknowledges that it is the occupier, bounty in lieu of rates is paid. As at present advised I am not prepared to hold that the practice adopted by the Commissioner of Valuation is wrong, and indeed my opinion is that it is the proper procedure. If I am right in this view, the fact that the hereditaments in question are occupied by the Crown (if such be the case) is not a ground for holding that they should not be distinguished as "exempt" on the valuation list. Accordingly, I do not proceed to consider whether, in the present case, the hereditaments in question are in the occupation of the Crown.

In considering whether the hereditaments in question are to be distinguished in the valuation list as being altogether of a public nature or exclusively used for charitable purposes, it must be borne in mind that the exemption from rates thereby involved is set out more precisely in section 63 of the Poor Law (Ireland) Act, 1838, in the following words: "Provided also, that no church, chapel, or "other building exclusively dedicated to religious worship, or ex- "clusively used for the education of the poor, nor any burial ground "or cemetery, nor any infirmary, hospital, charity school, or other "building used exclusively for charitable purposes, nor any building, "land, or hereditament dedicated to or used for public purposes, "shall be rateable, except where any private profit or use shall be "directly derived therefrom, in which case the person deriving such "profit or use shall be liable to be rated as an occupier according to "the annual value of such profit or use."

The provision of health services, including hospital services, throughout Northern Ireland for all who require such services is, in my opinion, clearly a public purpose. An adequate hospital service can only be provided by having hospitals in different parts

of the country. Each hospital is merely a unit in the whole scheme, and contributes its services to the public purpose. Each hospital is clearly, in my view, used for public purposes. I cannot find on the facts set out in the case stated any element of private profit or use directly derived therefrom, except in the case of the matron whose accommodation in the hereditaments is ancillary to and necessary for the public purposes of the hospital. It has been contended that the provision in the scheme of management for paying patients, and for private patients from whom doctors can obtain private fees, excludes the hereditaments from exemption. I cannot accept this contention. Assuming that such fees constituted a private profit directly derived from the hereditaments, what would the effect be with regard to liability for rates? According to section 63 of the Poor Relief (Ireland) Act, 1838, "the person deriving such "profit or use shall be liable to be rated as an occupier according "to the annual value of such profit or use." In other words, the Commissioner of Valuation would have to find the annual value of such profit or use and, in the case of private patients, name the doctors concerned as occupiers. As to payments by patients to the hospital authority, these are not, in my view, private profits within the meaning of the section.

I very much doubt whether payments of fees to doctors by their own patients are private profits directly derived from the hereditaments. If they are, or if the use of the hereditaments by the private patient and the doctor is a private use within the meaning of the section, I am afraid the task of the Commissioner of Valuation is going to be rather difficult. The material point is, however, that the hereditaments are, nevertheless, used for public purposes within the meaning of section 63 of the Poor Relief (Ireland) Act, 1838, and, therefore, within the meaning of the Valuation Acts. Accordingly I am of opinion that the learned county court judge was right in law in holding that the general hospital and the tuberculosis hospital were used for public purposes within the meaning of the said Acts.

It was contended on behalf of the appellants that these hereditaments had ceased to be exclusively used for charitable purposes by reason of the provisions of the Health Services Act, 1948. There has been no change in the purpose of these hospitals. The changes are in the ownership of the hereditaments and in the control and management of the hospital activities. In my opinion the learned

county court judge was right in law in holding that the two hospitals in question were still exclusively used for charitable purposes.

In carrying out his statutory duty under section 2 of the Valuation (Ireland) Act, 1854, the Commissioner of Valuation must distinguish on the valuation list such portions of hereditaments and tenements as are of a public nature or used for charitable purposes, etc. In the present case this must be done in such a way that the valuation of the administrative block, which, I agree, should not be so distinguished, appears on the valuation list. I am not satisfied that it is necessary or proper for the court to direct the segregation of the hereditaments or portions thereof. I prefer to leave it to the Commissioner of Valuation, with his great experience, to deal with the matter, unless he indicates that he requires some further assistance from the court.

Answers accordingly.

Solicitor for the Down County Council: *W. A. F. Martin.*
Solicitor for the Hospitals Authority: *K. J. Donaghy.*
Solicitor for the Commissioner of Valuation: *F. C. MacNeice.*
Solicitor for the Attorney-General: *Chief Crown Solicitor.*

J.P.

LOGUE v. BRITISH THOMSON-HOUSTON CO. LTD.[1]

Practice—Particulars—Action for personal injuries—Master and servant—Further and better particulars of acts of negligence and breach of statutory duty—Names of servants and agents.

In an action by a workman against his employers for damages for personal injuries caused by negligence and breach of statutory duty the defendants sought particulars of the names of their servants and agents who were guilty of negligence and of the acts of negligence or breach of statutory duty of which each was alleged to be guilty; of the respects in which the defendants failed to provide supervision; of the identity of the person who required the plaintiff to place his hand in proximity to an unfenced machine; and of the respects in which the plaintiff had been incapacitated from following his employment. In the particulars delivered the plaintiff named two servants and said that the names of the other servants and agents were unknown to him. He further stated that the defendants failed to supervise the working, operation and maintenance of the machine by which he had been injured. On the other matters he referred the defendants to the statement of claim.

Held, (i) that the plaintiff must give particulars of the acts of negligence and breach of statutory duty of which the two named persons were alleged to be guilty;

(ii) that no further particulars need be given of the respects in which the defendants failed to provide supervision;

(iii) that the plaintiff, having named two persons in the answer given to the notice for particulars, should particularise further as to the identity of the person who told him to place his hand near the machine;

(iv) that the respects in which the plaintiff had been incapacitated were quite clear from the statement of claim and that no further particulars need be given.

MOTION for an order for further and better particulars.

The plaintiff was employed as a machinist in the defendants' factory premises at Larne, and while working at a buffing machine his hand was seriously injured by reason of having come in contact with a revolving wheel of the machine.

The defendant served a notice requiring further and better particulars of the matters alleged by the plaintiff in his statement of claim. The material parts of the notice together with answers given by the plaintiff were as follows:—

"1. The names of all servants and agents of the defendants who "were guilty of either negligence or breach of statutory duty, to-"gether with particulars of the acts of negligence or breach of "statutory duty of which each servant or agent was guilty."

[1] In the Queen's Bench Division before Black L.J.: April 27, 1956.

"*Answer:* Mr. Connolly and Mr. Lavelle. The names of the other "servants and agents referred to are not known to the plaintiff at "the date of this notice. The acts of negligence and breach of statu- "tory duty are adequately set out in the statement of claim and "below."

"3. All respects in which the defendants failed to provide super- "vision."

"*Answer:* They failed to supervise the working, operation and "maintenance of the said wheel and buffing machine."

"4. The name of the person who required the plaintiff to place "his hand within close or dangerous proximity to an unfenced "machine."

"*Answer:* See 1 above."

"5. The terms in which such person so required the plaintiff."

"*Answer:* To guide a bar on the said machine."

"10. All respects in which the plaintiff has been incapacitated "from following his employment."

"*Answer:* See particulars of personal injuries."

The particulars of personal injuries in the statement of claim alleged that the plaintiff had suffered severe bruising and crushing of the forefinger and middle finger of the right hand, an extensive puncture of the forefinger, loss of the end of the middle finger, and limitation of movement and loss of sensation in both fingers.

The defendants, being dissatisfied with the answers given, served a notice of motion for an order that the plaintiff give particulars of:—

"(a) The acts of negligence and breach of statutory duty of which "defendants' servants and agents Mr. Connolly and Mr. Lavelle are "respectively alleged to have been guilty."

"(b) All respects in which the defendants failed to provide super- "vision."

"(c) The name of the person who is alleged to have required the "plaintiff to place his hand within close or dangerous proximity to "an unfenced machine."

"(d) All respects in which the plaintiff has been incapacitated "from following his employment."

Brown for the defendants.

McSparran for the plaintiff.

BLACK L.J.: Applications of this sort really have become beyond all reason. The practice of asking for particulars has been turned into a more or less skilled game of chess and I cannot see how all this business conduces to the better administration of justice.

However, dealing with this application as best I can, I do not see any harm in making an order in the terms of particular (a). It is a very narrow question concerning sins of commission and not of omission and I do not think very much turns on it. As regards particular (b) I do not consider that this is the sort of thing of which particulars should be asked. The allegation that the defendants failed to provide supervision is an allegation of fact, and anything further that the plaintiff could say would be a matter of evidence.

From the answer given to question 5 in the notice for particulars it is reasonable to infer that there was only one man who told the plaintiff to guide the bar on the machine and I think it is only fair to let the defendants know who that man was. In view of the plaintiff's answer to question 4, it would be quite possible for him to come in and say anyone gave him the order. I am not saying here that the plaintiff was bound to answer question 4, but having done so, I think it only right that he should be more specific, and should particularise further with regard to particular (c). On the incapacity point, it is perfectly obvious from the particulars of personal injuries in the statement of claim that the allegation is that the plaintiff sustained injuries to the tips of fingers of his right hand. It is quite clearly set out what happened to the plaintiff and it is absurd to ask in what respect he has been incapacitated.

I do not consider that the defendants are entitled to costs of this application. If particular (a) had stood alone my view might have been different but the request for further particulars under (b) and (d) is in my opinion quite unsustainable and it is only in the special circumstances of this case, and with considerable hesitation, that I have held the defendant entitled to know the name under particular (c) of the person who told the plaintiff to put his hand near the machine.

Order accordingly.

Solicitors for the defendants and applicants: *Johns, Elliott, Wallace & Co.*.

Solicitor for the plaintiff and respondent: *James L. MacAllister.*

S.M.M.

IN RE M., AN ARRANGING DEBTOR[1].

Bankruptcy—Arranging debtor—Preferential payments—Holiday credit stamps—"Wages of any labourer or workman"—Preferential Payments in Bankruptcy Act (Northern Ireland), 1933 (23 & 24 Geo. 5, c. 7), s. 1.

Amounts due from an employer in respect of a scheme designed to make provision for holiday remuneration for employees are "wages" due to the employee for the purpose of section 1(1) of the Preferential Payments in Bankruptcy Act (Northern Ireland), 1933.

A skilled craftsman is a "labourer or workman" within section 1(1)(c) and not a "clerk or servant" within section 1(1)(b).

APPLICATION by notice of motion that an order made by the Registrar at an adjourned proof of debt sitting by which he disallowed certain claims be rescinded, and that the claims of two employees of the arranging debtor for amounts due to them in respect of holiday credit stamps be treated as preferential[2].

An agreement dated December 30, 1944, made between the Builders' Federation of Northern Ireland and the Northern Ireland Association of Civil Engineering Contractors of the one part, and the National Federation of Building Trades Operatives of the other part, brought into being a scheme for holiday payments in the building and engineering trades. This scheme was designed to overcome the difficulty of providing for holiday payments in the building and engineering trades where work is, by its nature, casual and often involves frequent changes of employer. The scheme adopted required each employer for the time being to stamp a card in respect of each employee each week. The cards and stamps were supplied by a Management Committee set up under the agreement. On the last pay day before the employee's annual holiday his then employer paid him a sum equivalent to the total value of the stamps on his card and claimed reimbursement from the Management Committee.

In this case M. had failed to stamp the cards of two employees who were engaged as plasterers, and when he sought the protection of the court these employees claimed that the amounts due to them were "wages or salary of any clerk or servant" within the meaning

[1] In the Queen's Bench Division (Bankruptcy) before Sheil J.: Nov. 11, 1955.

[2] Preferential Payments in Bankruptcy Act (Northern Ireland), 1933, s. 1(1): "In the distribution of the "property of a bankrupt there shall "be paid in priority to all other "debts—
"....
"(b) all wages or salary....of any "clerk or servant, in respect of "service rendered to the bankrupt "during four months before the "date of the order of adjudication, "not exceeding fifty pounds:
"(c) all wages of any labourer or "workman not exceeding twenty-"five pounds....:"

of section 1(1)(b) of the Act of 1933, or "wages of any labourer or "workman" within section 1(1)(c) of that Act, and therefore entitled to be treated as preferential.

Doyle for the applicants.

A. J. Burgess (solicitor) for the assignees.

SHEIL J.: The question in this case is whether or not the applicants are entitled to claim the benefit of the provisions of the Preferential Payments in Bankruptcy Act (Northern Ireland), 1933. That Act, by section 1(1) provides that in the distribution of the property of a bankrupt—which by sub-section (6) includes the case of an arranging debtor—certain debts are to be paid in priority to all other debts, and paragraphs (b) and (c) of sub-section (1) provide that all wages of any clerk or servant in respect of services rendered to the bankrupt during four months prior to the order of adjudication, not exceeding fifty pounds, and all wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or piece work, in respect of services rendered to the bankrupt during the two months next before the order of adjudication, shall be included in the preferential payments.

The first question which I have to determine is whether certain monies due to the claimants in respect of holiday remuneration, are to be considered as "wages" due to them for the purposes of the Act. It is necessary, therefore, to consider the arrangements which have been made for the provision of holiday remuneration in the building and engineering trades.

The system of the scheme appears to me to be that the employer is to make weekly payments in respect of each worker to a central fund, and the payments so made are held in the fund to the credit of the worker. Mr. Burgess has argued that holiday remuneration does not accrue until the date of the holiday, but from the terms of the scheme it seems to me that what is envisaged is that the employer either credits the worker with the weekly payments by paying into the central fund, or obtains credit for the worker in the fund by the purchase of stamps. The question then arises as to whether the credit accruing from week to week is a credit to which the employee becomes entitled only on the completion of the term of employment in respect of which it is made. With respect to the payment of holiday credits to the employee, the scheme provides for the case of a man who is out of work, and while it suspends his right to the payment of holiday credits until the period between July 24 and 31 in any year, it provides that the worker who is un-

employed is entitled to make direct application to the central fund. This seems to me to indicate that the credit becomes due to the employee from week to week and that the employer at the time of payment loses all interest in the payments which he makes to the fund. There is a deferred payment but the employee cannot be deprived of his right to get the money.

I hold, therefore, that the payments made by the employer are made as a part of the contract between him and his employee, and are part of the wages of the employee just as much as the money which he receives in his weekly pay packet, although at the time of payment the worker is only entitled to have the amounts credited to him and paid into what I may describe as a "suspense account." I reach this conclusion without having recourse to the cases cited by Mr. Doyle, which show that under the Merchant Shipping Acts the term "wages" is to be construed widely so as to include emoluments. I do not think I need to consider whether these payments are to be described as emoluments, having already reached the conclusion that they are part of the ordinary wages of the worker.

I am satisfied accordingly that the applicants have established a case for preferential payment, which brings me to the question of whether they should be considered as coming within paragraph (c) of section 1(1). It seems to me that, quite apart from the decision of Uthwatt J. in *In re London Casino Ltd.*[1], that the term "clerk or "servant" is intended to refer to a person in the category which might be described as comprising "black-coated workers." These men are clearly skilled workers, but earning their livelihood by the brawn of their bodies as well as by the skill of their brains and hands and I do not consider that they come within the class of worker described in the Act as a "clerk or servant."

While I hold, therefore, that the claimants are entitled to priority in respect of these payments to the extent of the ceiling of the amount prescribed by the Act, that priority must be determined under paragraph (c) of section 1(1) rather than under paragraph (b).

Order accordingly.

Solicitors for applicant: *Lynch & O'Neill.*

Solicitor for the assignees: *Alexander J. Burgess.*

S.M.M.

[1] (1942) 167 L.T. 66.

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COMPANY—*Winding up—Distribution of surplus assets—Rights of preference and ordinary shareholders—Companies Act* (*Northern Ireland*), 1932 (22 & 23 *Geo.* 5, *c.* 7), *s.* 219. On the winding up of a private company, the surplus assets, after satisfying all liabilities and repayment of capital to shareholders, amounted to approximately £15,000. Part of the surplus was held in a special reserve fund and consisted of post-war refunds of excess profit tax. The balance was held upon profit and loss account and included a sum of £1,500 profit on sale of the company's business. The original capital consisted of ordinary shares, but preference shares were later issued. The rights of shareholders on winding up were not defined in either the memorandum or articles of association, or in the resolutions creating the preference shares. *Held*, (i) that the sum of £1,500 profit on the sale of the business ought to be divided amongst all the shareholders in proportion to the shares held by them, whether preference or ordinary; (ii) that the remainder of the

surplus assets, being in the nature of uncapitalised profits, should be divided amongst the holders of ordinary shares in the company. *In re Marshall Bros. Belfast Ltd.* [Ch.D. 78

CONACRE LETTING—*Death of tenant for life—Apportionment of conacre rent.* On the death of a tenant for life during the currency of a conacre letting, the rent paid in respect of the whole period of the letting is apportionable between the personal representatives of the tenant for life and the remainderman as if it had accrued from day to day. *Foster & McWilliams v. Cunningham and others* [Ch.D. 29

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CRIMINAL LAW—PUBLIC MISCHIEF—*Acts prejudicial to administration of public justice.* The appellant, who had made a false confession to the police implicating two other men and himself in a murder, was convicted on an indictment which described the offence as "Effecting a public mischief" and alleged in the particulars of offence that the appellant's false statements caused police officers, maintained at the public expense for the public benefit, to devote their time to the investigation of false allegations thereby depriving the public of their services and rendering subjects liable to suspicion, accusation and arrest. *Held* by the Court of Criminal Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.) that the acts of the appellant were prejudicial to the administration of public justice and accordingly constituted an indictable common law misdemeanour. The category of acts prejudicial to the administration of public justice is not limited to acts affecting the processes of adjudication but extends to acts affecting the police in their functions of investigating offences. *Held* further that the description of the offence as "Effecting a public mischief" did not vitiate the indictment. *Rex v. Manley* [1933] 1 K.B. 529 and *Reg. v. Newland* [1954] 1 Q.B. 158 considered. *Reg. v. Bailey* .. [C.C.A. 15

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DAMAGES—LOSS OF EXPECTATION OF LIFE—*Child aged seven years—Basis of assessment.* An award of £1,200 as damages for the loss of expectation of life of a child aged seven years must be considered as excessive and inconsistent with the decision of the House of Lords in *Benham v. Gambling* [1941] A.C. 157, even allowing for the depreciation in the value of money since that case was decided. So *held* by the Court of Appeal (Lord MacDermott L.C.J., Porter L.J. and Sheil J.), which by a majority substituted the sum of £450 as a proper award. *Williamson v. Honeyford* [C.A. 31

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DIVORCE—DESERTION—*Constructive Desertion—Conduct evidencing an intention to drive spouse away—Absence of desire that spouse should leave.* In cases of constructive desertion the petitioner must prove more than reasonable excuse for leaving the matrimonial home: the court must be satisfied that the respondent intended to bring the consortium to an end, and evidence of such intention may consist of conduct by the respondent which he knew or ought to have known would drive the petitioner away. A respondent's conduct may be evidence of an intention to drive the petitioner away notwithstanding a desire that the petitioner should remain in the matrimonial home. A husband who was normally reasonable and considerate was given to excessive drinking under the influence of which he became temporarily quarrelsome and ill-tempered, though his conduct on such occasions did not amount to cruelty. The wife left the matrimonial home after an incident when the husband, under the influence of

drink, abused the wife and pushed her into the street. *Held*, (i) that the husband's conduct on the occasion of the separation did not amount to cruelty though it did excuse the wife's withdrawal from the matrimonial home and would have afforded her a defence in any proceedings on the ground of her desertion. (ii) that the husand's conduct was not so flagrant or persistent as to show an intention to drive the wife away at variance with his desire that consortium should continue. Principles laid down in *Lang v. Lang* [1955] A.C. 402 applied. *Hull v. Hull* (1945) 12 Ir. Jur. R. 59 reconsidered. *McLaughlin v. McLaughlin* .. .. [Q.B.D. 73

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EMERGENCY LEGISLATION—*Agriculture—Importation of livestock—Forfeiture of proceeds of sale of livestock—Validity of regulations—Nature of sale contemplated by regulations—Agriculture (Miscellaneous War Provisions) Act*, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28(3)—*Livestock (Import from Eire and the Isle of Man) Regulations*, 1945 (*S.R.&O.* 1945, *No.* 942), *reg.* 5. Section 28(3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, empowers the Minister to make regulations determining the times and places at which livestock may be imported or brought into the United Kingdom from Eire and the Isle of Man and provides that "any regulations made "under this sub-section may contain "such provisions as appear to the said "Minister to be necessary for securing "the due operation and enforcement of "the regulations, including provisions as "to the forfeiture of livestock." The Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under this power included provisions for the seizure of livestock suspected to have been illegally imported, for the sale of such livestock by authorised officers, and for the forfeiture of such livestock of "the proceeds of sale thereof as the "case may be." *Held*, (i) that the provisions of the Regulations as to the forfeiture of the proceeds of sale of livestock were intra vires; (ii) that so long as the sale of the livestock by an authorised officer was bona fide it was not necessary to establish that the best possible price had been obtained. *Minister of Agriculture v. Healey* [C.A. 163

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HEALTH SERVICES—CONTRACT—*Rights of "transferred officers"—Compulsory retirement—Superannuation—Health Services Act (Northern Ireland)*, 1948 (11 & 12 *Geo.* 6, *c.* 3), *s.* 58(2). By section 58(2) of the Health Services Act (Northern Ireland), 1948, an officer of any hospital transferred to the employment of the Hospitals Authority by virtue of that Act "shall be employed by "the Authority on terms and conditions "(including conditions as to super-"annuation benefits) and in circum-"stances not less advantageous than "were applicable to his employment with "that hospital...." The Act further provided for the making of regulations for the superannuation of officers of the Authority and for the granting to persons already entitled to participate in other superannuation benefits of an option to retain rights corresponding with those previously enjoyed by them in lieu of the rights which they would otherwise enjoy under the regulations. At the coming into force of the Act of 1948 the plaintiff was employed at a hospital under conditions which did not impose any obligation to retire on attaining a particular age, and which secured to him a pension allowance if he should cease to hold office by reason of permanent infirmity or old age. On being transferred to the employment of the Authority the plaintiff elected to retain the superannuation rights corresponding with those previously enjoyed by him. In 1949 the plaintiff was regraded and was offered, and he accepted, an appointment under a contract which contained a condition terminating his appointment on his reaching the age of 65 years. The plaintiff claimed that, as a transferred officer, he was entitled to retain the benefit of his former conditions of employment which did not require him to retire on attaining a particular age. It was further argued on his behalf that to give effect to the condition requiring him to retire at the age of 65 would deprive him of the benefit of superannuation rights previously enjoyed since these were subject to the

condition precedent that retirement should be caused by permanent infirmity or old age. For the Hospitals Authority it was contended (inter alia) that section 58(2) applied only to transferred officers who had not accepted contractual employment under the Authority. *Held*, by the Court of Appeal (Lord MacDermott L.C.J. and Porter and Black L.JJ.), (i) that in determining whether the terms, conditions and circumstances of a transferred officer's employment were less advantageous than those applicable to his former employment it was necessary to have regard to the terms, conditions and circumstances viewed as a whole; (ii) that a requirement to retire at the age of 65 could be equated to a retirement on account of incapacity due to age, and accordingly the plaintiff would not lose his superannuation rights on being required to retire at the age of 65; (iii) (Black L.J. dissenting on this point), that the provisions of section 58(2) applied both to officers who were simply transferred to the employment of the Authority by the operation of the Act and also to those transferred officers who were subsequently employed by the Authority on a contractual basis. *Armstrong v. N.I. Hospitals Authority*. [C.A. 84

—CONTRACT OF EMPLOYMENT—"*Permanent post*" *Dismissal on due notice.* In August, 1948, the Northern Ireland General Health Services Board invited applications for clerical posts by an advertisement which stated that "subject to a probationary period the "appointments will be permanent and "pensionable." In response to the advertisement the appellant applied for and was appointed to a post, and a month after taking up her duties she was handed a memorandum of the terms and conditions of service approved by the Board. This memorandum referred to "permanent staff" and contained a clause providing for the dismissal of officers for gross misconduct or inefficiency, but contained no provisions for dismissal in other circumstances. It did, however, contain a provision that "permanent officers" who wished to terminate their employment must give one month's notice. In 1953 the Board gave the appellant six months' notice of dismissal to expire at the end of a year of service. There was no suggestion of misconduct or inefficiency on the part of the appellant, and the reason for the dismissal furnished by the Board was redundancy of staff. On an originating summons raising the question whether the appellant's service had been validly terminated, Curran J. held that the appellant was a civil servant and, as such, held office during the pleasure of the Crown. On appeal it was conceded by both parties that the appellant was not a civil servant. *Held*, by the Court of Appeal (Lord MacDermott L.C.J. and Black L.J., Porter L.J. dissenting), (i) that in the context of this contract "permanent" employment was to be contrasted with employment which was transient or linked to some particular occasion or the performance of some special task, and did not connote that the employment would endure for life; (ii) that six months' notice was proper notice and that accordingly the appellant's employment had been validly terminated. *Per* Lord MacDermott L.C.J.: Having regard to the provisions of the Health Services Act (Northern Ireland), 1948, and to the constitution of the Health Services Board as a statutory corporation it is clear that service of the Board is not service of the Crown. *McClelland v. N.I. General Health Services Board* .. [C.A. 127

HOUSE OF LORDS—*Appeal from Court of Appeal—Orders in probate matters—Probate and Letters of Administration (Ireland) Act*, 1857 (20 & 21 *Vict., c.* 79), *s.* 45—*Judicature Act (Ireland)*, 1877 (40 & 41 *Vict., c.* 57), *s.* 86. The Court of Appeal in Northern Ireland, like the Court of Appeal in England, is bound by its previous decisions save in the limited and exceptional classes of case enumerated in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718. An application to the court for particulars of a plea of undue influence in a probate action was refused, and this decision was affirmed by the Court of Appeal on the ground that the same had been held by that court in *Kerr v. Browne* (1944—unreported), and as that case had not been decided per incuriam it must be followed. A request for a further hearing before a "full Court of "Appeal" was refused on the ground that the practice of the former Court of Appeal in Ireland sitting as a "full "Court of Appeal" to review its own decisions appears to have been limited to those cases where no further appeal to the House of Lords was possible, and section 86 of the Judicature Act (Ireland), 1877, preserves a right of

appeal to the House of Lords from all orders, final and interlocutory, in probate matters. *Quaere* if in any circumstances a "full Court of Appeal" in Northern Ireland has power to review previous decisions of the Court of Appeal. *Parkinson v. Watson* [C.A. 1

INDUSTRY—*Re-equipment of industry—Industrial undertaking—Manufacture of goods—Processing of ryegrass seed—Re-equipment of Industry Act (Northern Ireland)*, 1951 (14 & 15 *Geo.* 6, *c.* 2), *s.* 13. The Re-equipment of Industry Act (Northern Ireland), 1951, provides for grants towards the re-equipment and modernisation of industrial undertakings, and section 13 of that Act defines "industrial undertaking" as meaning any person or body of persons engaged in "the manufacture of goods." A company carried on the business of processing, machining and marketing ryegrass seed. The processing and machining consisted of drying the seed and passing it through a series of sieves and mechanical separators which removed foreign matter, seeds other than ryegrass seed and defective ryegrass seed and reduced it in bulk by approximately one-twelfth. The resultant bulk was not less than 98% pure ryegrass seed. *Held*, by the Court of Appeal (Lord MacDermott L.C.J., and Porter L.J., Black L.J. dissenting) that though the company did not manufacture individual seeds, yet it did produce a different commodity from an unsorted bulk, namely pure ryegrass seed which was marketable for seeding purposes, and that this production of the commodity by means of a series of complicated mechanical processes constituted a "manufacture of goods" for the purposes of the Act. Decision of Curran J. reversed. *Samuel McCausland Ltd. v. Ministry of Commerce* .. [C.A. 36

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LOCAL REGISTRATION OF TITLE—*Failure to register lands purchased under Land Purchase Acts—Devolution on intestacy—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict.*, *c.* 66), *Part IV*. The owner of lands which had been purchased in 1886 under the Land Purchase Acts but which had never been registered, died intestate. The lands were claimed by the widow as next of kin and by a nephew as heir at law. *Held*, that as the lands were purchased prior to the Local Registration of Title (Ireland) Act, 1891, they were not, in the absence of registration, affected by Part IV of that Act, and consequently devolved upon the heir at law. *Re Mary Smith* (1897) 33 I.L.T.R. 69 followed. *In re Stewart*. [Ch.D. 82

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——DIVORCE—*Petition for divorce—No appearance entered—Interlocutory summons—Summons not served on respondent—Order made on foot of summons—Whether "proceeding had"—R.S.C. Or.* 64, *r.* 15; *Or.* 70, *rr.* 9, 62, 78. On December 14, 1953, a petition for divorce was presented and served personally on the respondent who did not enter an appearance. On October 18, 1955, application was made to the Registrar of the Queen's Bench Division (Matrimonial) for a certificate that the pleadings were in order, and the question was raised whether this was a cause or matter in which there had been no proceeding for one year from the last proceeding had within Order 64, rule 15, so as to necessitate a month's notice to the other party of intention to proceed. On December 7, 1954, a summons had been taken out on behalf of the petitioner for an order permitting the petitioner's evidence to be received on affidavit as she was out of the jurisdiction. On January 14, 1955, an order was made on this summons, as amended, that the petitioner's evidence should be taken abroad before an examiner. The summons was, in accordance with established practice, issued as a *pro forma* summons

and addressed to all parties concerned: such a summons is not served otherwise than by filing in conformity with the rules. *Held*, that the summons of December 7, 1954, was "a proceeding "had" within Order 64, rule 15, and no notice of intention to proceed need be served. *Semble*, that in any event an order made on foot of a summons and acted upon without objection would constitute "a proceeding had" within Order 64, rule 15, notwithstanding that the summons had not been duly served. *Glass v. Glass* .. [Q.B.D. 119

——PARTICULARS—*Action for personal injuries—Master and servant—Further and better particulars of acts of negligence and breach of statutory duty—Names of servants and agents.* In an action by a workman against his employers for damages for personal injuries caused by negligence and breach of statutory duty the defendants sought particulars of the names of their servants and agents who were guilty of negligence and of the acts of negligence or breach of statutory duty of which each was alleged to be guilty; of the respects in which the defendants failed to provide supervision; of the identity of the person who required the plaintiff to place his hand in proximity to an unfenced machine; and of the respects in which the plaintiff had been incapacitated from following his employment. In the particulars delivered the plaintiff named two servants and said that the names of the other servants and agents were unknown to him. He further stated that the defendants failed to supervise the working. operation and maintenance of the machine by which he had been injured. On the other matters he referred the defendants to the statement of claim. *Held*, (i) that the plaintiff must give particulars of the acts of negligence and breach of statutory duty of which the two named persons were alleged to be guilty; (ii) that no further particulars need be given of the respects in which the defendants failed to provide supervision; (iii) that the plaintiff, having named two persons in the answer given to the notice for particulars, should particularise further as to the identity of the person who told him to place his hand near the machine; (iv) that the respects in which the plaintiff had been incapacitated were quite clear from the statement of claim and that no further particulars need be given. *Logue v. British Thomson-Houston Co. Ltd.* .. .. [Q.B.D. 179

——PROBATE—*Proof of will in solemn form—Plea of undue influence—Particulars—R.S.C. Or.* 19, *rr.* 6, 7. In an action for probate of a will in solemn form particulars of a plea of undue influence will not be ordered. *Kerr. v. Browne* (1944—unreported) followed. *Parkinson v. Watson* .. [C.A. 1

——REMITTAL—*Contract claim exceeding £100—Tender before action of sum sufficient to reduce claim to less than £100—Common Law Procedure Amendment Act, Ireland*, 1870 (33 & 34 *Vict., c.* 109), *s.* 5—*Supreme Court (Northern Ireland) Act*, 1942 (6 & 7 *Geo.* 6, *c.* 2), *s.* 1. The plaintiff claimed from the defendant a sum exceeding £100 alleged to be due under a contract for the sale of goods. The defendant admitted a part of the claim and sent the plaintiff a cheque in respect of that part. The plaintiff returned the defendant's cheque and sued in the High Court for the full amount of his claim. The plaintiff did not dispute that the sending of the cheque constituted tender before action brought of the amount which the defendant admitted to be due. This amount was sufficient to reduce the plaintiff's claim to less than £100. On a motion to have the action remitted to the County Court, *held* that the court had no jurisdiction to remit. *Owen v. Roebuck* (1901) 36 I.L.T.R. 63 followed. *Stockman v. Moffatt* [Q.B.D. 169

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——THIRD PARTY—*Third party procedure—Necessity of showing prima facie case against third party.* A defendant in an action of tort who seeks to bring in a third party for the purpose of obtaining contribution or indemnity must show that the proposed third party is prima facie liable. *Fox. v. Armagh Education Authority* .. .. [Q.B.D. 171

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QUARRIES—*Breach of statutory duty—Duty to see that a sufficient supply of proper materials and appliances is provided—Whether duty absolute—Quarries Act (Northern Ireland)*, 1927 (17 & 18 *Geo.* 5, *c.* 19), *Sched.* 1, *rule* 1. A workman employed in a quarry injured his back while assisting to lift a slab of granite on to a truck. In an action

against the employer the workman claimed damages for breach of statutory duty, the duty relied on being that contained in rule 1 of the first schedule to the Quarries Act (Northern Ireland), 1927, which, under the title "Prevention "of Dangerous Accidents in a Quarry," provides that "the owner....shall see that a sufficient supply of proper materials and appliances....for the "purpose of ensuring the safety of the "quarry and the persons employed, is "always provided." At the trial the following questions were left to the jury: (1) Did the defendant fail to provide a reasonably safe plant for loading the granite slabs for conveyance....? (2) Did the defendant fail to take reasonable care to provide a safe system of work for the loading of the granite slabs for conveyance....? *Held*, by the Court of Appeal (Porter and Black L.JJ. and Sheil J.), that the duty imposed by rule 1 of the first schedule to the Quarries Act (Northern Ireland), 1927, is an absolute duty to provide materials and appliances adequate to ensure the safety of persons employed in a quarry, and that the first question left to the jury did not adequately raise the issue of a breach of that duty. Per Sheil J. *Quaere* whether the statutory provisions relied on were intended to cover an accident of the kind suffered by the plaintiff. *Hamilton v. Niblock*. [C.A. 109

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VALUATION ACTS—*Rating—Premises used as hospitals by Hospitals Authority and Tuberculosis Authority—Hereditaments altogether of a public nature and used exclusively for charitable purposes—Occupation of premises by Crown—Poor Relief (Ireland) Act*, 1838 (1 & 2 *Vict.*, *c.* 56), *s.* 63—*Valuation (Ireland) Act*, 1852 (15 & 16 *Vict.*, *c.* 63), *ss.* 12, 16, 23—*Valuation (Ireland) Act*, 1854 (17 & 18 *Vict.*, *c.* 8), *s.* 2. Hospitals vested in the Northern Ireland Hospitals Authority under the Health Services Act (Northern Ireland), 1948, or maintained by the Northern Ireland Tuberculosis Authority under the Public Health (Tuberculosis) Act (Northern Ireland), 1946, are properly distinguished as exempt in the valuation list under the Valuation Acts on the ground that they are altogether of a public nature and exclusively used for charitable purposes; and the fact that provisions exist for the accommodation in a hospital of paying patients and of private patients from whom doctors can exact private fees does not deprive such hospital of the claim to be distinguished as exempt. The practice of the Commissioner of Valuation by which property occupied by the Crown is included in the valuation list and distinguished as exempt as being altogether of a public nature is a proper practice. *Sed quaere* whether hospital premises occupied by the Northern Ireland Hospitals Authority or the Northern Ireland Tuberculosis Authority are in the occupation of the Crown. *Down County Council v. Commissioner of Valuation* .. .. [Q.B.D. 173

WILL—*Construction—Gift to future trustees—Rule against perpetuities. Practice—Court of Appeal—Death of judge—Court equally divided—Liberty to enter appeal for rehearing.* A testator whose will established complicated trusts directed that any future trustee who might be appointed to carry out the trusts of the will should be paid £100. The trusts were so framed that all the beneficial interests would necessarily vest within the period prescribed by the rule against perpetuities, but there was a possibility that the trusts might continue beyond that period and that it might become necessary to appoint a new trustee outside that period. An originating summons having been taken out to decide a number of questions arising out of the will, Curran J. held, inter alia, that the gift to future trustees was void as contravening the rule against perpetuities. On appeal to the Court of Appeal that court sat with three judges, one of whom died before judgment was given. The remaining judges being divided in opinion it was *held* that the parties should be at liberty to enter the appeal for rehearing, but in the absence of any such rehearing the order of the court below should stand. Per Lord MacDermott L.C.J. The gifts to trustees are really attendant on the trusts of the will, and the circumstances of each appointment of a trustee should be awaited before the question of the validity of each gift is settled. Per Black L.J. The gifts to future trustees are void as they could vest outside the perpetuity period. *In re McConnell* [C.A. 151

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